

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7 DIOVANNI CARTER,

8 Defendant.

)
)
)
) Criminal Action
) No. 1:19-CR-10104-ADB-1
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)

9
10 BEFORE THE HONORABLE ALLISON D. BURROUGHS
11 UNITED STATES DISTRICT JUDGE

12 JURY TRIAL
13 DAY 8

14 March 11, 2020
15 9:40 a.m.

16 John J. Moakley United States Courthouse
17 Courtroom No. 17
18 One Courthouse Way
19 Boston, Massachusetts 02210

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P R O C E E D I N G S

1
2 THE COURT: I have another copy of the instructions
3 for you redline. There's a bunch of nits, but there's two
4 substantive offenses I want to run by you. The first is I took
5 out the conduct of counsel charge. I use that in -- the only
6 trial I ever used that in was the Insys trial. It went on for
7 14 weeks. There was a lot of acrimony between the parties. I
8 felt like it was needed. I don't think it's needed here.

9 MR. SULTAN: What is that, Your Honor?

10 THE COURT: Conduct of counsel. It's page 5.

11 MR. SULTAN: Page 5?

12 THE COURT: I just don't think there's been anything
13 here -- I feel like giving the instruction is more --

14 MR. SULTAN: I agree, Your Honor.

15 THE COURT: I just don't think it's needed in this
16 case. The conduct was perfectly fine on both sides. To
17 suggest there may have been any impropriety goes against what I
18 want to do here.

19 The other substantive change that I made was on page
20 24, it's impeachment of witness testimony by a prior
21 conviction. I moved that right after the cooperating witness
22 charge. So moved it up a page. So it was page 24. Now it's
23 page 23. And I added, instead of saying "witness," I added
24 Dennis Martin's name. He's the only one.

25 MR. SULTAN: I agree, Your Honor.

1 THE COURT: I'm going to give you a redline. You can
2 look through the rest of them, but I think that's the only
3 substantive one -- substantive two, substantive ones.

4 I understand the government wanted to add sort of
5 basically a Pinkerton instruction to the verdict form. I'm not
6 going to do that. I did add aiding and abetting. When I
7 explain the verdict form to them, I'll explain they can find
8 guilt based on principal, aiding and abetting or Pinkerton.

9 MR. MALLARD: I was commenting on 4A and 4B. I think
10 it says "Diovanni Carter brandished the firearm. Diovanni
11 Carter discharged the firearm." I don't think it needs to be
12 identified by the defendant having done either of those things.

13 THE COURT: So I added aiding and abetting language to
14 A and B too.

15 MR. MALLARD: Okay. I'm going off the wrong version.
16 I apologize.

17 THE COURT: That's fine. He added aiding and abetting
18 to Count Three. We're going to add it to Count Two as well.
19 So Count Two will say -- see where it says the word "robbery"?
20 I was going to add after that "or aiding and abetting the
21 offense."

22 MR. MacKINLAY: Yes.

23 MR. MALLARD: I think that's -- the government would
24 be happy with that if that were to be the case.

25 THE COURT: So we'll get a redline on that in a

1 minute, before 10:00. Do I have the red lines for them?

2 LAW CLERK: I just handed them out.

3 THE COURT: So you guys have the redlines. I want
4 them to see the verdict form.

5 LAW CLERK: I have that.

6 THE COURT: With the language added to Count Two.

7 LAW CLERK: I'll be right back.

8 MR. MALLARD: Your Honor, if I could have the witness
9 resume the stand.

10 THE COURT: Sure. That would be great.

11 THE CLERK: All rise for the jury.

12 (Jury enters.)

13 THE CLERK: Court is in session. Please be seated.

14 THE COURT: Good morning, everybody.

15 JURORS: Good morning.

16 THE COURT: I think Mr. Sultan was about to begin his
17 cross-examination of Mr. Burke. And I remind you you're under
18 oath.

19 THE WITNESS: Yes, Your Honor.

20 RYAN BURKE, having been previously duly sworn by the
21 Clerk, was examined and testified as follows:

22 CROSS-EXAMINATION

23 BY MR. SULTAN:

24 Q. Good morning, Special Agent Burke.

25 A. Good morning.

1 Q. Let's start where we left off yesterday on direct
2 examination.

3 MR. SULTAN: With the court's permission, Hannah,
4 could you please show Exhibit 149 to the witness and to the
5 jury.

6 Q. Do you have that in front of you, Special Agent?

7 A. I do, sir.

8 Q. So you told us this was an analysis you did of when
9 certain phones were in contact with each other during the
10 period of time that you were analyzing, right?

11 A. That's correct.

12 Q. Okay. So I just want to draw your attention to line 3.
13 Can you zoom in on that, please. Okay.

14 So am I correct that this line of your chart
15 involves -- it refers to two different cell phones associated
16 with Dennis Martin?

17 A. That's correct.

18 Q. Okay. And this shows, does it not, that during the time
19 period that you were looking at, there were 150 calls between
20 the two Dennis Martin phones and the phone associated with
21 Stephan Rosser-Stewart, who you referred to as Puff, right?

22 A. That's correct.

23 Q. And this chart also shows, does it not, that during that
24 same period of time there were 239 calls between the two Dennis
25 Martin phones and the Terrell Jackson phone, right?

1 A. That's also correct.

2 Q. You don't know whether Terrell Jackson had a second phone,
3 do you?

4 A. No, I don't.

5 Q. So is it fair to say that, based on the number of calls in
6 the period that you were analyzing, that Martin's phones
7 contacted either the Rosser-Stewart phone or the Jackson phone
8 that you're aware of, or vice versa, an average of two or three
9 times a day during that period of time, roughly?

10 A. 389 total, so.

11 Q. I'm sorry?

12 A. 389 total times. I can't do the math quick enough.

13 Q. Well, for each one. So you looked at about 50 days,
14 right?

15 A. Yes.

16 Q. Okay. So 150 contacts in 50 days between the Martin
17 phones and the Rosser-Stewart phone, that works out to an
18 average of three a day, right?

19 A. Right. Correct.

20 Q. And 239 contacts between the Martin -- one of the two
21 Martin phones and the Terrell Jackson phone during that same
22 50-day period works out to an average of somewhere between four
23 and five contacts a day?

24 A. Correct, sir.

25 Q. Right?

1 A. Yes.

2 MR. SULTAN: All right. Can you take that off,
3 please.

4 Q. All right. Then let's move on to the rest of your
5 analysis, Special Agent Burke. You're not a radio frequency
6 engineer, are you?

7 A. No, I'm not.

8 Q. And, in fact, you're not an engineer, period, right?

9 A. No, I'm not.

10 Q. You don't have any science degree, do you?

11 A. No, I don't.

12 Q. And before you started working for the FBI, you worked for
13 the MBTA police, right?

14 A. I did.

15 Q. You've never worked for Sprint or for any other phone
16 company, have you?

17 A. No, I haven't.

18 Q. In this case, you're a member of the prosecution team,
19 aren't you?

20 A. I was requested by the prosecution to conduct the
21 analysis.

22 Q. Okay. And you've been doing stuff at the behest of the
23 prosecutors, right?

24 A. Yes.

25 Q. You don't work for me, right?

1 A. You didn't ask.

2 Q. Okay. You've met with the prosecutors many times, right?

3 A. Yes.

4 Q. Okay. And they told you their theory of the case, didn't
5 they?

6 A. They did.

7 Q. Okay. And they told you exactly what they wanted to be
8 able to show through your work, didn't they?

9 A. No. They told me what their theory of the case was and
10 asked if I would review the records to see if they corroborated
11 their suspicions.

12 Q. You knew that they were trying to connect the 2207 phone
13 to this robbery, didn't you?

14 A. I know they believed that it was involved.

15 Q. I don't care what they believed. That's what they asked
16 you to do, right?

17 A. No. They asked me to review the records to see if it was
18 consistent with the location of the robbery, which it was.

19 Q. Okay. They told you which phones to include in your
20 analysis, right?

21 A. They did. They provided the records to me.

22 Q. That wasn't your decision. That was their call, right?

23 A. That's correct, yes.

24 Q. And they told you which cell sites to include in your
25 analysis, didn't they?

1 A. No, they did not. They asked -- they just gave me the
2 times of the relevant events.

3 Q. Well, they told you which addresses to look at, right?

4 A. They told me the address of the residences and the
5 T-Mobile store, yes.

6 Q. Did they give you any other addresses?

7 A. They did. They gave me the address where the getaway car
8 was recovered and the Hertz rental car location.

9 Q. Let me ask you about another address.

10 You mapped certain locations, right?

11 A. I did.

12 Q. Okay. Did you ever map the location 108 Moraine Street in
13 Brockton?

14 A. No.

15 MR. SULTAN: Hannah, could you put on Exhibit 201,
16 please, with the court's permission. Hard copy. All right.

17 Let me put on the screen, if I can get some help,
18 what's been -- a copy of what's been marked as 201. Oh, I
19 don't even need help, look at that.

20 It's hard to see. May I approach the witness, Your
21 Honor?

22 THE COURT: Yes.

23 Q. Special Agent Burke, I'm showing you what's been admitted
24 as Exhibit 201. Do you see the two addresses that are marked
25 on this map, 521 Belmont Street, that's the site of the

1 T-Mobile store, right?

2 A. That's correct.

3 Q. And the 108 Moraine Street, right?

4 A. Yes.

5 Q. And you never did anything about 108 Moraine Street,
6 right?

7 A. I never mapped it, no.

8 Q. Well, would you agree with me that 108 Moraine Street --
9 and by the way, did you know that Diovanni Carter's grandmother
10 lived at 108 Moraine Street?

11 A. I do recall that being mentioned recently, yes.

12 Q. And would you agree that 108 Moraine Street is a short
13 distance away from the T-Mobile store?

14 A. It's not far, that's correct.

15 Q. Short distance away; is that fair to say?

16 A. Sure.

17 Q. Is it fair to say that a call made to or from 108 Moraine
18 Street very likely used the same cell tower as a call made to
19 or from the vicinity of the T-Mobile store?

20 A. I would have to look at the layout of the network in that
21 area, but for sure for the time frame just before the robbery,
22 the PCMD measurements that would not have been at 108
23 Moraine --

24 Q. We'll get to PCMD. We're talking about cell tower. Very
25 likely used the same cell tower, right?

1 A. I can't answer that offhand.

2 Q. You can't answer that question because you never looked at
3 108 Moraine Street, right?

4 A. Right.

5 Q. Now, after you met with the prosecutors and they gave you
6 certain information, you prepared and you knew the theory of
7 the case, right?

8 A. I did, yes.

9 Q. You prepared a written report with maps and diagrams in
10 it, right?

11 A. Yes.

12 Q. Okay. And you gave it to them to review, right?

13 A. I did.

14 Q. And it wasn't exactly what they were looking for, was it?

15 A. There were quite a bit of updated reports produced.

16 Q. Well, that's because they asked you to do it a little
17 differently, right?

18 A. Slight changes in timeframes and combinations of numbers
19 that were displayed, but nothing substantive.

20 Q. So at their request you produced a report, a revised
21 report over and over and over again, didn't you?

22 A. I did.

23 Q. Okay. So the first report you produced was back on March
24 26, 2019?

25 A. That sounds correct.

1 Q. And then you revised it, another report, on the next
2 month, April 16, 2019, does that sound right?

3 A. It sounds right, yes.

4 Q. And then revised it again, a new report, September 3,
5 2019?

6 A. Yes.

7 Q. And then you revised it again, another report, October 24,
8 2019?

9 A. Yes.

10 Q. Then you revised it yet again and did another report
11 January 23, 2020?

12 A. Yes.

13 Q. And you revised it again five days later, did another
14 report, January 28, 2020, right?

15 A. Correct.

16 Q. Then you revised it again, did another report, February
17 19, 2020, right?

18 A. Correct.

19 Q. Then you revised it a final time, and that's what was
20 introduced into evidence yesterday as Exhibit 146, right?

21 A. That's correct.

22 Q. And by the time you did Exhibit 146 a couple of -- just
23 March 9, just a few days ago --

24 Right?

25 A. Correct.

1 Q. -- you had it exactly the way the prosecutors wanted it;
2 is that fair to say?

3 A. Yes.

4 Q. Now, let's talk a little bit about what you know about
5 cell phones. A cell phone is like a two-way radio, right?

6 A. It is.

7 Q. And it operates using radio waves, right?

8 A. It does.

9 Q. And I've got a cell phone, it operates like a transmitter
10 receiver, right?

11 A. Yes, it does.

12 Q. It connects to the strongest signal, right?

13 A. Yes.

14 Q. Okay. Not necessarily the closest cell site, correct?

15 A. Correct.

16 Q. It depends on a lot of factors, including the height of
17 the site, the wattage of the site, the capacity of the site,
18 the weather, physical obstructions, make and model of the
19 phone, all those things, right?

20 A. Yes, more or less. Less about capacity and weather, but
21 for the most part, yes.

22 Q. But there's a lot of factors --

23 A. There are.

24 Q. -- to determine which cell site a phone call connects to?

25 A. That's correct, sir.

1 Q. And you said on direct the signal travels at the speed of
2 light?

3 A. Yes.

4 Q. Do you happen to know what that is?

5 A. It's 386,000 miles per second, if I recall.

6 Q. Would it be 186,282 miles per second?

7 A. That sounds right.

8 Q. It's pretty fast, right?

9 A. It is fast, mind blowing.

10 Q. The phone must be within the coverage area of a particular
11 cell site to connect to that cell site, right?

12 A. That's correct.

13 Q. And the determination of which cell site is going to
14 handle a particular call, that's determined by the network
15 software, right?

16 A. So the -- at the initiation of a call, a phone is
17 selecting the cell site, and once that call is established, the
18 network has a bit more control over where it's handled.

19 Q. The network makes some kind of a call or decision as to
20 which site is going to handle that phone call, right?

21 A. Correct, but it's that initial site that's recorded in the
22 call detail records.

23 Q. Okay. Now, some of the information you looked at was cell
24 site location information, right?

25 A. Yes.

1 Q. CSLI, cell site location information?

2 A. Yes.

3 Q. You looked at that in this case, right?

4 A. Yes.

5 Q. And cell site location information, that tells you what
6 cell site was used in a particular call at the beginning of the
7 call and at the end of the call, right?

8 A. Yes.

9 Q. Okay. It doesn't tell you why, right?

10 A. Well, we know why for the initial. We wouldn't know -- I
11 guess we wouldn't know why for the end other than --

12 Q. The records don't tell you why, do they?

13 A. I guess not, but --

14 Q. They just tell you -- they tell you the number of the
15 site, right?

16 A. Right.

17 Q. Okay. And the records don't tell you the coverage area of
18 each cell site, do they?

19 A. No, they don't.

20 Q. And the coverage areas for each cell site tend to overlap,
21 don't they?

22 A. There's some overlap, yes.

23 Q. Okay. So is it fair to say that all you can say with CSLI
24 data, or cell site location information data, is that the phone
25 was within the coverage area of a particular site during that

1 call or when that call was initiated?

2 A. Not including per call measurement data, yes, that's
3 correct.

4 Q. We'll get to that. I know you want to talk about per call
5 measurement data.

6 A. It's all CSLI to me, so I just wanted to make the
7 distinction.

8 Q. We are talking first about just the cell site location
9 information.

10 A. Just the tower sector, yes, that's correct.

11 Q. The range of these cell sites vary from one to ten miles,
12 roughly, is that a fair estimate?

13 A. You might have towers in the middle of the desert that
14 cover ten miles, but not in eastern Massachusetts.

15 Q. Well, what's the range in eastern Massachusetts?

16 A. Again, it depends where the tower is in the network and
17 its proximity to other towers. It's all very customizable by
18 the engineer, but one mile to two miles is probably about
19 average.

20 Q. But you don't know the actual coverage area of any of the
21 cell sites used in this case, do you?

22 A. No, we can only estimate with the records.

23 Q. Do you know how many cell sites for each phone company
24 there were in operation within ten miles of 521, or say five
25 miles, of 521 Belmont Street in Brockton on January 26, 2019?

1 A. I don't have that memorized. I could look at a tower
2 list, but...

3 Q. And you don't know where each of those sites was located,
4 do you?

5 A. I don't have them committed to memory, but there's a list
6 that would contain that information.

7 Q. But you can't tell us that here at this trial; is that
8 fair to say?

9 A. No, I certainly cannot.

10 Q. Did you visit any of those sites yourself?

11 A. No.

12 Q. Did you do a test drive to determine the range of each of
13 those sites?

14 A. No, I didn't do a drive test.

15 Q. Do you know the height, the wattage of each of those
16 sites?

17 A. The wattage, no. The height may be contained -- well, the
18 Sprint towers, no, I don't know the height.

19 Q. You can't give us any of that information, right?

20 A. No.

21 Q. Okay. Did you review any of the maintenance and repair
22 logs on any of these cell sites to determine whether they were
23 in working order on that day?

24 A. Well, I know all the sites that were used were in working
25 order, but I did not review any other logs for other sites that

1 weren't used.

2 Q. You didn't review any logs at all, did you, maintenance
3 logs?

4 A. I don't have access to those logs.

5 Q. And you didn't ask for access, did you?

6 A. No.

7 Q. Now, you produced these charts and diagrams and maps to
8 illustrate the government's theory of the case; isn't that
9 right?

10 A. Well, I don't think you're phrasing it correctly. I
11 didn't produce maps to illustrate the government's case. I
12 produced maps of my analysis, which happens to support the
13 government's case.

14 Q. Well, let's look at Exhibit 146.

15 MR. SULTAN: Could you put up page 21, please.

16 Q. So you talked about this yesterday, right?

17 A. Yes.

18 Q. Okay. And there's -- this lists on the right a bunch of
19 different cell phone calls that were made during that period of
20 time, right?

21 A. Correct.

22 Q. Okay. And then there are bunch of these arcs on the map,
23 right?

24 A. Yes.

25 Q. And we're going to talk about per call measurement data in

1 a minute, but those arcs relate to per call measurement data,
2 right?

3 A. They do.

4 Q. So let's just look at the second -- say the second arc
5 from the top. Which call does that arc relate to?

6 A. I would have to review the records. I don't have it
7 offhand, but it's one of the calls between 7:05 and 7:13.

8 Q. So as you sit here today, you can't tell us which of these
9 calls correspond to which of the arcs that you put on the map,
10 can you?

11 A. The most distant arc is at 7:15.

12 Q. I didn't ask about the most distant one. I asked you
13 about the other ones. There's a big blob of them. You can't
14 tell us which one goes with which call, can you?

15 A. Not offhand, no. But they're all relatively close, so...

16 Q. Not offhand. Okay. Now, you call this a chart? What do
17 you call this thing we're looking at, a diagram? What would
18 you call it?

19 A. A map of the activity between 7:05 and 7:17.

20 Q. A map. Okay. This map is made using some kind of
21 off-the-shelf software, right?

22 A. Yes.

23 Q. Anybody can buy that software on Amazon, right?

24 A. I'm not sure if you can buy it on Amazon.

25 Q. But it's nothing that's the FBI created in its cell phone

1 lab, is it?

2 A. We work hand in hand with the company, but it's not an FBI
3 product, no.

4 Q. It's just an off-the-shelf software package, right?

5 A. Right. It's a tool -- it's a product offered by
6 Gladiator.

7 Q. You don't know what the error rate is for that software
8 package, do you, Special Agent Burke?

9 A. Well, the program is used to automate the analysis.

10 Q. Do you know the error rate, sir, yes or no?

11 A. Zero percent.

12 Q. Zero percent?

13 A. The program does what I ask it to do. So this information
14 is accurate.

15 Q. It does whatever you ask, right?

16 A. Right.

17 Q. And you ask it to do what the prosecutor has asked you to
18 do; isn't that right?

19 A. No. I asked it to map out this tower that was used
20 accurately, and also to pick arcs at the appropriate distances
21 provided in the Sprint records.

22 Q. Now, per call measurement data. Much of your analysis --

23 MR. SULTAN: Can you take that off, please.

24 Q. -- and much of the maps and diagrams in Exhibit 146 that
25 you testified about yesterday, much of that analysis is based

1 on per call measurement data, isn't it?

2 A. For the Sprint phones, yes.

3 Q. Okay. And per call measurement data is abbreviated as
4 PCMD, right?

5 A. That's correct.

6 Q. And all those arcs that were on the page we were just
7 looking at, page 21, that's all based on PCMD, isn't it?

8 A. Yes, it is.

9 Q. Now, would you agree with me, Special Agent Burke, that if
10 the PCMD data isn't accurate, your analysis isn't accurate
11 either, is it?

12 A. If it were inaccurate?

13 Q. Yes.

14 A. Yes.

15 Q. You agree with me, right?

16 A. Well, I believe it is accurate, but yes.

17 Q. That's not what I asked you. If it's not accurate, your
18 analysis is no good. Is that fair to say?

19 A. Sure.

20 Q. Okay. Did you ever hear in the computer world a saying
21 "garbage in/garbage out"?

22 A. Yes.

23 Q. If the data you put in is worthless, the analysis at the
24 end is going to be worthless too. Is that a fair --

25 A. Of course, yes.

1 Q. Okay. All right.

2 Now, let's look at Government Exhibit 119.

3 MR. SULTAN: Could you put that up, please. With the
4 court's permission, could that be shown to the jury as well?
5 Can you zoom in on that a little bit so we can read it. Why
6 don't you start at the very top, please, the title. Thank you.
7 Okay.

8 Q. So Exhibit 119, this is a document that was produced by
9 Sprint to accompany the data that it provided. Is that fair to
10 say?

11 A. Yes.

12 Q. Okay. And you've seen this document before, right?

13 A. I have.

14 Q. So let's just look at the rest of page 1, please. So page
15 1 has certain subscriber information on it. Can you zoom in on
16 the bottom half -- I guess first the top half of it. Let's go
17 through the whole document. Okay.

18 And this is -- this is about -- what's the subject
19 number of this document?

20 A. That would be the phone ending in 2207.

21 Q. That's the 2207 phone that you were talking about
22 yesterday, right?

23 A. Yes.

24 Q. That's the phone that's associated with my client,
25 Diovanni Carter, right?

1 A. Correct.

2 Q. Okay.

3 MR. SULTAN: Let's -- can we look at the bottom half
4 of page 1, please.

5 Q. This is just more stuff about this particular account and
6 how --

7 A. Yes.

8 Q. -- what was on the account. Okay.

9 MR. SULTAN: Let's look at page 2, please. Can you
10 zoom in on the first half of page 2.

11 Q. This is more stuff about the account and the various
12 features of the --

13 A. Yes. Various identifiers and features.

14 Q. Okay. Can you go to the bottom half of it, please, this
15 page. Okay. There's more stuff about --

16 MR. SULTAN: Can you zoom in a little bit, please.

17 A. More feature activity.

18 Q. More features on this account, right?

19 A. Yes.

20 Q. Now, let's look at page 3 of this document, please. Page
21 3 of this exhibit that was introduced by the government as
22 Exhibit 119, page 3 is all blacked out, isn't it?

23 A. Yes, it is.

24 Q. Can we go to page 4, please. Page 4 of this document that
25 was introduced by the government as 119 is all blacked out,

1 isn't it?

2 A. Yes, it is.

3 MR. SULTAN: Could you go to page 5, please.

4 Q. Page 5 of this document that was introduced by government
5 as Exhibit 119 is all blacked out, isn't it?

6 A. It is.

7 MR. SULTAN: And let's go to page 6.

8 Q. Page 6 of this document that was introduced by the
9 government as Exhibit 119, that's all blacked out, right?

10 A. Yes, it is.

11 Q. Whose decision was it to black out the last four pages of
12 this document, sir? Was that your decision?

13 A. No.

14 Q. Let me show you another document.

15 MR. SULTAN: May I approach, Your Honor?

16 THE COURT: Yes.

17 MR. SULTAN: Let's go back to page 1, please.

18 Q. I show you another document, sir.

19 A. Okay.

20 Q. Six-page document. Start at the beginning. Why don't you
21 compare the first page of that document to page 1 of Exhibit
22 119.

23 A. It's the same.

24 Q. It's the same document?

25 A. It is.

1 Q. Why don't you go to page 2. Can we go to page 2 of this
2 document, please. Page 2 of the document I'm just showing you
3 is the same as page 2 of Exhibit 119, right?

4 A. Yes, it is.

5 Q. And you've seen the rest of this document, haven't you?

6 A. This is a common report sent by Sprint. So yes.

7 Q. So why don't you look at pages 3, 4, 5 and 6 of that
8 document.

9 A. Okay.

10 Q. Would you agree that that's all part of the same document?

11 A. Well, yes.

12 Q. Okay. Except the copy I've shown you, pages 3, 4, 5 and
13 6, are not blacked out, are they?

14 MR. SULTAN: I'd offer this as the next exhibit, Your
15 Honor.

16 MR. MALLARD: I object, Your Honor.

17 THE COURT: Object or not object?

18 MR. MALLARD: I do object.

19 THE COURT: Basis?

20 MR. MALLARD: Hearsay.

21 THE COURT: I need to see it.

22 MR. SULTAN: Do you want me to respond, Your Honor?

23 THE COURT: Not at the moment. (Pause.)

24 Response?

25 MR. SULTAN: It's a business record, Your Honor. It's

1 part of the same document and completeness. I'm sorry. More
2 than three words.

3 THE COURT: Yes. Business record.

4 MR. MALLARD: It goes to -- there's other information
5 on it that's irrelevant and not -- I think I know where he's
6 going with it. I don't have a problem with that part. There's
7 just other information that shouldn't probably come in.

8 THE COURT: All right. So I'm not totally sure what
9 you're talking about, although I'm happy to hear you at sidebar
10 about it, but does pulling off the last two pages solve the
11 objection?

12 MR. MALLARD: Yes, that's fine.

13 THE COURT: And then that leaves -- is there anything
14 else that you would want redacted?

15 MR. MALLARD: I think there's other phone numbers on
16 the preceding pages that don't necessarily pertain to what's
17 going on with I think the cross, which I'm happy to deal with,
18 but I understand the last two pages.

19 THE COURT: So pull off the last two pages. Right?

20 MR. SULTAN: Well, the last two pages, those are going
21 to be admitted, Your Honor. That's what I want. Pages 5 and
22 6.

23 THE COURT: All right. I need to see you at sidebar.

24 **(SEALED SIDEBAR IN SEPARATE TRANSCRIPT)**

25 THE COURT: Do you have a number on that, Mr. Sultan?

1 MR. SULTAN: 209.

2 (Defendant Exhibit 209 received in evidence.)

3 Q. Special Agent Burke, I'm showing you page 5, or a portion
4 of page 5 of this document that's been admitted into evidence
5 as Exhibit 209. Could you please read to the jury the first
6 two paragraphs of what's under "Comments," please.

7 A. Yes. "Please see attached records found for the requested
8 time period. The PCMD records enclosed may not be accurate or
9 complete. Sprint is unable to explain, certify or testify to
10 the accuracy of these records as they may be erroneous. PCMD
11 disclaimer: Please be advised that there are known accuracy
12 variances with Sprint PCMD reporting. Therefore, Sprint is
13 unable to certify or testify to the accuracy of PCMD records.
14 It is important to understand that the tool used to provide
15 PCMD records was created as a tool for Sprint to oversee the
16 network. It was not created as a tool to identify customer
17 location, pursuant to exigent circumstance or legal demand.
18 Nevertheless, it has been used in those situations as it is a
19 Sprint record that could possibly lead to customer location."

20 Q. Okay. So this PCMD data is precisely what you relied on,
21 correct?

22 A. It's part of what I relied on, and I do believe it to be
23 accurate.

24 Q. And it's what you're asking the members of the jury to
25 believe beyond a reasonable doubt, right?

1 A. Yes, and they should.

2 MR. SULTAN: I have no further questions. Thank you,
3 Your Honor.

4 THE COURT: Redirect examination?

5 MR. MALLARD: If I could have that.

6 MR. SULTAN: Sure.

7 REDIRECT EXAMINATION

8 BY MR. MALLARD:

9 Q. Counsel had you read a couple paragraphs but not the whole
10 thing, right?

11 A. That's correct.

12 Q. Let's keep going.

13 A. "There are several variance factors that may impact the
14 accuracy of the reporting. Those factors include but are not
15 limited to the use of repeaters, small cells and natural
16 geographic influences. The records are an accurate
17 representation of what happened during the communication.

18 "The latitude and longitude found on PCMD reporting
19 is not historic GPS for the device."

20 Q. Are you familiar with this particular disclaimer?

21 A. I am.

22 Q. Have you seen it before?

23 A. Every single time I look at Sprint records.

24 Q. Does it affect you and what you do?

25 A. No. I find Sprint customers in emergencies all the time

1 with this information.

2 Q. What is your opinion of this disclaimer?

3 A. I just think because it's not a billing record, Sprint
4 doesn't feel comfortable authenticating it for court, but I'm
5 not sure why. We do find it to be accurate, and it is
6 accurate.

7 Q. Authenticating means to the keeper of the record, right?

8 A. Yes.

9 Q. So that would be just some person coming in testifying
10 that this is the record of Sprint; isn't that right?

11 A. Right.

12 Q. Now, are you familiar with a gentleman named Justin
13 Darrow?

14 A. Yes.

15 Q. Have you had a chance to meet him before?

16 A. Yes, he's a Sprint engineer.

17 Q. When did you last see him?

18 A. In the hallway yesterday.

19 Q. Before or after he testified?

20 A. Before.

21 Q. Probably before?

22 A. Yes.

23 Q. And have you had a chance to speak with him in his
24 capacity as a Sprint RF engineer with respect to PCMD
25 engineering data?

1 A. Yes.

2 Q. How many engineers have you worked with at Sprint over the
3 course of your time with respect to PCMD data?

4 A. Close to ten probably.

5 Q. And working in the expert capacity that you serve in with
6 the CAST team and working with those experts from Sprint, what
7 do you do with the PCMD data?

8 A. We use it to find phones, and Sprint uses it to monitor
9 their network because it's accurate.

10 Q. Now, looking at the information on the PCMD data, like
11 everything, there's an error rate, it's not always accurate,
12 right?

13 A. There are factors that could sort of artificially extend a
14 distance, just because if the path had traveled for -- the
15 signal isn't direct, it may take a little bit longer. So some
16 measurement may be artificially longer. It could never be
17 shorter.

18 If I may, in addition to that, also within the PCMD
19 report is an estimated latitude and longitudinal coordinate of
20 the device, which we don't use because we have found is not as
21 accurate as the estimated distances.

22 Q. That's all this disclaimer is doing, is saying there might
23 be known accuracy variations with the PCMD reporting, right?

24 A. Yes.

25 Q. In your context, let's go through again some of the

1 circumstances and applications that you used the PCMD data for.

2 A. If we're trying to locate a fugitive with a Sprint phone
3 or a missing person with a Sprint phone or some other scenario
4 in realtime where someone needs to be located, we immediately
5 request Sprint records and PCMD records and map those out, and
6 that's where we direct our search, and that's where we find
7 people.

8 Q. Find lost people?

9 A. Yes.

10 Q. How many times have you done that successfully?

11 A. With Sprint's records specifically it's tough to say, but
12 50 plus times.

13 Q. What about the CAST team as a whole, are you familiar with
14 their use of PCMD and the 70 odd experts that you work with?

15 A. It's being used by somebody right now probably as we speak
16 to look for somebody. It's so routine.

17 Q. And in that routine use, does the CAST team generally as
18 an entity find it to be accurate?

19 A. Yes. And that's why we look for it. That's why we
20 request it.

21 Q. Now, there was some discussion about how your report had
22 been sort of updated over the course of the last few months.

23 A. That's correct.

24 Q. Fair to say that new phone records were obtained as the
25 investigation continued; isn't that right?

1 A. Yes, it is.

2 Q. So it started out with only a couple phones; isn't that
3 true?

4 A. Correct.

5 Q. Generated a report?

6 A. Correct.

7 Q. As search warrants were obtained for additional phones,
8 those numbers were then incorporated into the report?

9 A. Correct.

10 Q. To make sure that the phones that we're looking at were
11 accurately mapped and we knew where they were?

12 A. Yes.

13 Q. And even up until I think there was a report updated, I
14 think counsel said, sometime in October, it was updated with
15 additional phones trying to ensure locations of phones even up
16 to that point with additional search warrants being obtained
17 and records being given to you for processing and updating?

18 A. Yes, that's correct.

19 Q. And that's what the updates were for?

20 A. Yes.

21 Q. Not to manipulate the data?

22 A. No. The data contained in the report is my analysis. It
23 has no influence from anyone besides myself.

24 Q. And you need to update the report when you get new phone
25 records; isn't that right?

1 A. When we get new phone records or some event becomes
2 relevant or irrelevant, different evidence, many factors.

3 MR. MALLARD: Can I have one moment?

4 THE COURT: Yes.

5 BY MR. MALLARD:

6 Q. Was there any per call measurement data that you reviewed
7 during the course of the time frame on January 26, 2019 that
8 was consistent with activity in the area of 108 Moraine Street?

9 A. Could you repeat the time frame. I'm sorry.

10 Q. During the course of the -- of that slide from that 6:45
11 to 7:05, 7:17 slide?

12 A. No, there was no activity that would suggest the device
13 was at 108 Moraine Street.

14 MR. MALLARD: No further questions, Your Honor.

15 THE COURT: Recross?

16 MR. SULTAN: Very briefly.

17 RECROSS-EXAMINATION

18 BY MR. SULTAN:

19 Q. Special Agent Burke, the truth is you can't pinpoint where
20 any particular phone was located at any particular time, can
21 you?

22 A. Never, no.

23 MR. SULTAN: Thank you, sir.

24 THE COURT: You're excused. Thank you.

25 THE WITNESS: Thank you, Your Honor.

1 MR. MALLARD: The government rests, Your Honor.

2 THE COURT: Thank you. The government rests.

3 Mr. Sultan.

4 MR. SULTAN: Defense calls Officer William Willis,
5 please.

6 THE CLERK: Raise your right hand, please.

7 (Witness sworn.)

8 THE WITNESS: I do.

9 THE CLERK: You may be seated. State your name and
10 spell your last name for the record.

11 THE WITNESS: William John Willis, W-i-l-l-i-s.

12 WILLIAM J. WILLIS, having been duly sworn by the
13 Clerk, was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SULTAN:

16 Q. Good morning, sir. Tell us where you work, please.

17 A. Brockton police.

18 Q. What do you do for the Brockton Police Department?

19 A. Patrolman.

20 Q. How long have you worked for the Brockton Police
21 Department?

22 A. I was employed September of 1998, 22 years.

23 Q. Okay. And were you working on January 26, 2019?

24 A. Yes.

25 Q. Do you remember what your shift was that day?

1 A. I'm sorry?

2 Q. Do you remember what your shift was that day, sir?

3 A. I was 4:00 to 12:00 shift.

4 Q. 4:00 p.m. to midnight?

5 A. Yes, sir.

6 Q. At some point during your shift were you -- did you go to
7 a particular location as a result of radio calls?

8 A. I responded to a robbery pursuit.

9 Q. And where precisely did you go?

10 A. I was on Center Street when the call came in, and we
11 initially I believe entered the pursuit on Bristol and Carl
12 Ave.

13 Q. And when you got to Bristol and Carl Ave., what did you
14 see?

15 A. A white Cavalier that was abandoned and a few other
16 officers were there.

17 Q. A white car?

18 A. A white car, yes, Malibu. Sorry.

19 Q. A Malibu?

20 A. Yes.

21 Q. And did you have any role in searching that white Malibu
22 for evidence?

23 A. Yes.

24 Q. Tell us what you did, sir.

25 A. I stayed with the car, secured and searched some of the

1 back contents and the front.

2 Q. So you searched the car, and you were able to -- did you
3 obtain anything from the car?

4 A. Yes.

5 MR. SULTAN: May I approach, Your Honor?

6 THE COURT: Yes.

7 Q. Showing you a plastic bag with an item in it, do you
8 recognize what that item is, sir?

9 A. It's a black wallet.

10 Q. Have you seen that black wallet before?

11 A. Yes.

12 Q. Where did you see it?

13 A. It was the driver's side rear. It was in like a
14 compartment, a plastic compartment in the door side.

15 Q. So this wallet was inside that Malibu when you searched it
16 that evening, right?

17 A. Yes.

18 Q. Was that shortly after 7:30 p.m.?

19 A. About there.

20 Q. Okay. Now, I'm going to -- did you open the wallet at
21 all?

22 A. Yes.

23 Q. Okay. So I'm going to do that, too. Okay?

24 A. Sure.

25 Q. So is one of the things that you found in that wallet the

1 item I'm putting in front of you?

2 A. Yes.

3 Q. And what do you recognize that item to be?

4 A. It was an ID of Terrell Jackson.

5 Q. A Massachusetts ID of Terrell Jackson?

6 A. Yes.

7 MR. SULTAN: I'd offer this as the next exhibit, Your
8 Honor.

9 MR. MacKINLAY: No objection, Your Honor.

10 THE COURT: It's admitted. 210.

11 (Defendant Exhibit 210 received in evidence.)

12 Q. And let me show you something else. Do you recognize that
13 document, Officer Willis?

14 A. No, sir, I do not. I don't recognize it.

15 Q. Do you recognize that as something that was in the wallet?

16 A. I do not recognize that as being in the wallet, no, sir.

17 Q. Okay. Have you ever seen that document before?

18 A. No, sir. Not to my recollection.

19 Q. Okay. Did you find a white plastic bag next to the
20 wallet?

21 A. There was a large plastic bag that was stuffed in the
22 center of the seat.

23 Q. I'm talking about a small transparent plastic bag with
24 some white substance in it.

25 A. It was a small amount of marijuana in a bag, leafy

1 substance, which I believed to be marijuana near the wallet.

2 MR. SULTAN: Do you have the exhibits, Karen?

3 THE CLERK: Just the last --

4 MR. SULTAN: Thank you.

5 May I show this to the jury, please? This is Exhibit
6 202.

7 THE COURT: Yes.

8 Q. Officer Willis, I'm showing you Exhibit 202. Does that
9 appear to be the little compartment --

10 A. Yes.

11 Q. -- where you found the wallet?

12 A. Yes.

13 Q. And do you see that little white bag --

14 A. Yes.

15 Q. -- next to that?

16 A. Clear plastic bag.

17 Q. I'll show you another close-up of that, which is Exhibit
18 203. Do you see that white bag?

19 A. Yes, sir.

20 Q. Did you see that next to the wallet that night?

21 A. Yes, sir.

22 Q. Okay. Now, in addition to finding some evidence in the
23 car, did you find some evidence in the street?

24 A. Yes.

25 Q. What did you find in the street?

1 A. It was a pair of Adidas running shoes -- not Adidas. I
2 believe they were Nike shoes. They were left.

3 Q. A pair of shoes, right?

4 A. A pair of shoes.

5 Q. Did you find a cell phone?

6 A. A cell phone too, Alcatel cell phone.

7 MR. SULTAN: Thank you, Officer Willis. That's all I
8 have.

9 MR. MacKINLAY: May I approach, Your Honor?

10 THE COURT: Yes.

11 CROSS-EXAMINATION

12 BY MR. MacKINLAY:

13 Q. Officer Willis, a moment ago you were shown a black
14 wallet; is that true?

15 A. Yes.

16 Q. Is this the wallet that you recovered?

17 A. Yes.

18 MR. MacKINLAY: I'd offer it into evidence, please, as
19 Exhibit No. 166, please, Your Honor.

20 MR. SULTAN: No objection.

21 (Government Exhibit 166 received in evidence.)

22 THE COURT: It's admitted.

23 MR. MacKINLAY: May I have the document camera for the
24 jury.

25 Q. Officer Willis, where did you find this wallet and the

1 contents?

2 A. Yes. I found it on the back seat driver's side.

3 Q. Left rear seat?

4 A. Left rear seat.

5 Q. Was there anything else there with it?

6 A. There was a license in there. There was another license
7 underneath it.

8 Q. When you say "underneath it," do you mean physically
9 underneath it?

10 A. Physically underneath it, yes.

11 MR. MacKINLAY: Exhibit 165 for identification.

12 May I approach, Your Honor?

13 THE COURT: Yes.

14 Q. I'm showing you an item and ask if you recognize that,
15 Officer Willis?

16 A. Yes.

17 Q. What is it?

18 A. That's the license I found underneath the wallet.

19 Q. Underneath the wallet in the same left-hand side rear door
20 compartment?

21 A. Yes, sir.

22 MR. MacKINLAY: I would offer it into evidence as
23 Exhibit 165, please, Your Honor.

24 MR. SULTAN: No objection.

25 THE COURT: It's admitted.

1 (Government Exhibit 165 received in evidence.)

2 Q. Is that the identification that you found underneath the
3 wallet in that compartment, sir?

4 A. Yes.

5 Q. Did you secure that as well as the wallet and turn it in
6 to evidence?

7 A. Yes.

8 Q. You were asked a few moments ago on direct examination
9 about a plastic bag that was observed in a couple of the
10 photographs that were taken of the items in that slot. Do you
11 remember that?

12 A. Yes.

13 Q. You mentioned something about marijuana. What was in the
14 bag?

15 A. A leafy green substance that looked like marijuana to me,
16 resembling marijuana.

17 Q. What did you do with the bag?

18 A. I believe we discarded it. I didn't take it as evidence.

19 Q. How much or little was in it?

20 A. A little bit. Not even -- personal use weight, I'd say.

21 Q. Just to be clear, it wasn't a white powder substance?

22 A. No.

23 Q. It was what you believed to be a green leafy substance?

24 A. It was a leafy substance, yes.

25 MR. MacKINLAY: No further questions of the witness,

1 Your Honor.

2 THE COURT: Redirect?

3 MR. SULTAN: Nothing further.

4 THE COURT: You're excused. Thank you.

5 MR. SULTAN: Your Honor, the defendant, Diovanni
6 Carter, rests.

7 THE COURT: Rebuttal?

8 MR. MacKINLAY: No, Your Honor.

9 THE COURT: All right. You've heard all the evidence.
10 I'm going to let you make your first decision here. So it's
11 11:00.

12 Can you all give me an estimate on length of closing,
13 just for scheduling purposes? No one's going to hold you to
14 it.

15 MR. MacKINLAY: Forty, 45 minutes, in that range, Your
16 Honor.

17 MR. SULTAN: I won't be longer than that.

18 THE COURT: It looks like around an hour and a half
19 for closings. I think what I will do is charge them now,
20 release them for lunch, and then have closings. Does that work
21 for everybody?

22 MR. MacKINLAY: Yes, Your Honor.

23 MR. SULTAN: That's fine, Your Honor.

24 THE COURT: I know you guys haven't been here long
25 enough to know, but Wednesday is always buffalo chicken day.

1 So it's a big treat here in the courthouse. Everybody likes
2 buffalo chicken.

3 All right. The charge will be no more than an hour
4 but approaching an hour. And because I give you written copies
5 of it while you're deliberating, I actually have to read it to
6 you in order to make sure that what I say to you and what you
7 have in the jury room are the same. I am ready to get going
8 now, but if you all would like a stretch or a break before I
9 go, we can do that.

10 JUROR: I just need to use the bathroom.

11 THE COURT: We'll take a quick break because I want to
12 get this done. I want to do it before lunch. We'll take a
13 quick break now and come back for the charge.

14 THE CLERK: All rise for the jury.

15 (Jury exits.)

16 (A recess was taken.)

17 THE CLERK: All rise for the jury.

18 (Jury enters.)

19 THE CLERK: Court is in session. Please be seated.

20 THE COURT: All right. As I said, I have to read
21 these sort of quid pro quo before giving you a written copy
22 when you go back there. It's important that what I say and the
23 written copy say the same thing.

24 I'm going to try not to drone, and I will try to read
25 it in as animated and an interesting fashion as I can.

1 It is your job as jurors to find the facts from the
2 evidence admitted in this case. You will then apply the law as
3 I give it to you to the facts as you find them. You must
4 follow the law as I explain it to you, whether you agree with
5 that law or not. Regardless of any opinion you may have as to
6 what the law should be, it would violate your sworn duty as
7 jurors in this case to base a verdict on any view of the law
8 other than that given in my instructions. You must decide the
9 case solely on the evidence before you and according to the
10 law.

11 Counsel may have quite properly referred to some of
12 the applicable rules of law in the course of trial. If,
13 however, any difference appears to you between the law as
14 stated by counsel or otherwise reflected in the exhibits and
15 the law as stated by me, you are to be governed by the
16 instructions given to you by me.

17 In following my instructions you must follow all of
18 them and not single out some and ignore others.

19 You must not interpret these instructions, or anything
20 I may have said or done during this trial as a suggestion by me
21 as to what verdict you should return. That is a matter
22 entirely for you to decide.

23 Your verdict must be based solely on the evidence and
24 according to the law.

25 You may not base your verdict on any personal

1 feelings, prejudices or sympathies you may have about the
2 defendant or about the nature of the crimes with which he has
3 been charged. You may not consider or be influenced by any
4 possible punishment that may be imposed on the defendant if he
5 is convicted of some or all of the charges.

6 Every person accused of a crime is presumed to be
7 innocent unless and until his or her guilt is proved beyond a
8 reasonable doubt. This presumption is a fundamental principle
9 of our system of justice.

10 The presumption of innocence means that the burden of
11 proof is always on the government to prove that a defendant is
12 guilty of the crimes with which he is charged beyond a
13 reasonable doubt.

14 This burden never shifts to a defendant. It is always
15 the government's burden to prove each of the elements of a
16 charged crime beyond a reasonable doubt. A defendant does not
17 have to prove that he is innocent, or even present any
18 evidence.

19 The presumption of innocence alone may be sufficient
20 to raise a reasonable doubt and to require the acquittal of the
21 defendant. You may not convict the defendant here if the
22 government has failed or was unable to prove every element of a
23 crime charged against him beyond a reasonable doubt.

24 A reasonable doubt is a doubt that a reasonable person
25 has after carefully weighing all of the evidence. It is a

1 doubt that would cause a reasonable person to hesitate to act
2 in a matter of importance in his or her personal life. Proof
3 beyond a reasonable doubt must, therefore, be proof of a
4 convincing character that a reasonable person would not
5 hesitate to rely upon in making an important decision. A
6 reasonable doubt may arise not only from the evidence produced,
7 but also from a lack of evidence. Reasonable doubt exists
8 when, after weighing and considering all of the evidence, using
9 reason and common sense, jurors cannot say that they have a
10 settled conviction of the truth of the charge.

11 You may not convict the defendant based on speculation
12 or conjecture.

13 You may not convict the defendant if you decide that
14 it is equally likely that he is guilty or not guilty. If you
15 decide that the evidence would reasonably permit either of two
16 conclusions -- either that he is guilty as charged, or not
17 guilty -- you must find the defendant not guilty.

18 You may not convict the defendant of any charge if you
19 decide that it is only probable, or even strongly probable,
20 that he was guilty of that charge. A mere probability of guilt
21 is not guilt beyond a reasonable doubt.

22 The law does not, however, require that the government
23 prove guilty beyond all possible doubt; proof beyond a
24 reasonable doubt is sufficient to convict. There are very few
25 things in this world that we know with absolute certainty, and

1 in criminal cases the law does not require proof that overcomes
2 every possible doubt.

3 Again, the defendant in this case is presumed to be
4 innocent, and the government bears the burden of proving him
5 guilty beyond a reasonable doubt. If, after fair and impartial
6 consideration of all of the evidence, you have a reasonable
7 doubt as to the defendant's guilt on any charge, it is your
8 duty to acquit him, but if after a fair and impartial
9 consideration of all the evidence you are satisfied beyond a
10 reasonable doubt as to his guilt on a charge, you should vote
11 to convict.

12 Your verdict must be unanimous on any charge in order
13 to convict the defendant of that charge. In other words, all
14 of you must agree that the defendant is guilty of a charged
15 offense for you to find the defendant guilty of that charge.

16 The fact that the prosecution is brought in the name
17 of United States of America entitles the government to no
18 greater consideration than that accorded to any other party to
19 a litigation. By the same token, it is entitled to no less
20 consideration. All parties, whether government or individuals,
21 stand as equals before the law.

22 Like all defendants, Mr. Carter has a constitutional
23 right not to testify. No inference of guilt, or of anything
24 else, may be drawn from the fact that he did not testify, nor
25 may the fact that he did not testify be discussed or considered

1 by you in any way in arriving at your verdict. There are many
2 reasons why a defendant would choose not to testify and you
3 should not speculate why Mr. Carter chose not to testify in
4 this case or give it any consideration. To discuss or consider
5 a defendant's choice not to testify would violate his rights
6 and your oath as a juror. You must not discuss or consider
7 Mr. Carter's constitutionally protected choice not to testify.

8 The evidence in this case consists of the sworn
9 testimony of witnesses, both on direct and cross-examination;
10 the exhibits that have been received into evidence; and any
11 facts to which the parties have agreed or stipulated or that I
12 took judicial notice of. A stipulation means simply that the
13 government and the defendant accept the truth of a particular
14 proposition or fact. Since there is no disagreement, there is
15 no need for evidence apart from the stipulation. You must
16 accept the stipulation as fact to be given whatever weight you
17 choose. You should consider all of the evidence, no matter
18 what form it takes, and no matter which party introduced it.
19 You are entitled, however, to give any particular piece of
20 evidence whatever weight you choose.

21 Whether the government has sustained its burden of
22 proof on any charge does not depend upon the number of
23 witnesses it has called or upon the number of exhibits it has
24 offered, but instead upon the nature and quality of the
25 evidence that has been presented.

1 Certain things are not evidence.

2 Arguments and statements by lawyers are not evidence.
3 What they said in their opening statements or what they will
4 say in their closing arguments is intended to help you
5 interpret the evidence, but it is not evidence. If the facts
6 as you remember them from the evidence differ from the way the
7 lawyers have stated them in their openings, closings or while
8 questioning witnesses, your memory of the facts should control.

9 Questions by lawyers and any information included in
10 those questions standing alone are not evidence.

11 Objections by lawyers are not evidence. You should
12 not be influenced by any objection or by my ruling on it, and
13 if an answer was not admitted, you should not speculate or
14 guess about what the answer might have been or what an exhibit
15 might have said.

16 Anything that I have struck or instructed you to
17 disregard is not evidence.

18 The indictment is not evidence.

19 And anything you may have seen or heard while court
20 was not in session, and I hope there isn't anything in that
21 category, is also not evidence.

22 As we discussed at the start of this trial, there's
23 direct evidence and circumstantial evidence. Direct evidence
24 is direct proof of a fact such as testimony from an eye witness
25 that the witness saw something. Circumstantial evidence is

1 indirect evidence; that is, proof of a fact or facts from which
2 you could draw a reasonable inference that another fact exists,
3 even though it has not been proved directly.

4 You are entitled to consider both direct and
5 circumstantial evidence and may give equal weight to both. It
6 is for you to decide how much weight to give to any particular
7 piece of evidence, whether direct or circumstantial.

8 Although you may consider only the evidence presented
9 in this case, you are not limited to the plain statements made
10 by witnesses or contained in the documents.

11 You are permitted to draw reasonable inferences from
12 the facts, if you believe those inferences are justified in
13 light of common sense and personal experience. An inference is
14 simply a deduction or a conclusion that may be drawn from the
15 facts that have been established.

16 Any inferences you draw must be reasonable and based
17 on the facts as you find them. Inferences may not be based on
18 speculation or conjecture.

19 I'm going to go back to my example on direct and
20 circumstantial evidence. You see your kid eating a chocolate
21 chip cookie, direct evidence that he ate the cookie.
22 Circumstantial evidence: You don't see the kid eating the
23 cookie, but the cookies are gone and his face is covered in
24 chocolate. From that circumstantial evidence, you can draw the
25 reasonable inference that that kid ate that cookie, even though

1 you didn't actually see it.

2 On the other hand, if your kid hates chocolate chip
3 cookies and won't eat them, and the dog looks happy, and your
4 spouse is home and the cookies are still gone, assuming that
5 your kid ate the cookie might not be a reasonable inference,
6 assuming that the dog or your significant other ate the cookie
7 might be the more reasonable inference in that case.

8 Throughout this trial, evidence was sometimes received
9 for a limited purpose only. That is, it can only be used by
10 you for one particular purpose, and not for any other purpose.
11 I have told you when that occurred and instructed you on the
12 purposes for which the item can and cannot be used. In this
13 trial, those limiting instructions have often concerned
14 hearsay. As I instructed you, those statements were admitted,
15 for example, to explain what happened in response to the
16 statement being made, but they may not be considered for the
17 truth of the statement.

18 You do not have to accept the testimony of any witness
19 if you find that the witness is not credible. You must decide
20 which witnesses to believe, considering all of the evidence and
21 drawing upon your common sense and personal experience. You
22 may believe all of the testimony of a witness, or some of it,
23 or none of it. You alone are the judges of the witnesses'
24 credibility.

25 In deciding whether to believe the testimony of the

1 witnesses, you may want to take into account such factors as
2 their conduct and demeanor while testifying; any apparent
3 fairness or unfairness they may I have displayed; any interest
4 they may have in the outcome of the case; any prejudice or bias
5 they may I have shown for or against any party; their
6 opportunities for seeing and knowing the things about which
7 they testified; the reasonableness or unreasonableness of what
8 they said while testifying; and any testimony or other evidence
9 that tends to support or contradict their versions of the
10 events.

11 The testimony of a witness may be discredited or
12 impeached by showing that he or she previously made statements
13 that are inconsistent with his or her present testimony. If a
14 witness made inconsistent statements about any material matter,
15 you have a right to distrust the testimony of that witness in
16 other respects. You may reject all of the testimony of that
17 witness or give it such credibility as you think it deserves.

18 In making this determination, you may consider whether
19 the witness purposely made a false statement or whether it was
20 an innocent mistake; whether the inconsistency concerned an
21 important fact, or whether it had to do with a small detail;
22 whether the witness had an explanation for the inconsistency,
23 and whether that explanation appealed to your common sense.
24 Sometimes people make innocent mistakes, particularly as to
25 unimportant details; not every contradiction or inconsistency

1 is necessarily important. You alone are the judges of the
2 witnesses' credibility.

3 If you find that a witness previously made statements
4 that were the same as, or similar to, what the witness said in
5 the courtroom, you may also consider evidence of these kinds of
6 statements in determining the facts of this case.

7 You have heard people -- you have heard testimony from
8 persons described as experts. An expert witness has special
9 knowledge or experience that allows that witness to give an
10 opinion.

11 An expert is allowed to express his or her opinion on
12 those matters about which he or she has special knowledge or
13 training. Expert testimony is presented to you on the theory
14 that someone who is experienced in the field can assist you in
15 understanding the evidence or in reaching an independent
16 decision on the facts.

17 You may accept or reject such testimony in whole or in
18 part. In weighing the testimony, you should consider the
19 factors that generally bear upon the credibility of a witness,
20 as well as the expert witness's education and experience, his
21 or her reasons for testifying, the soundness of the reasons
22 given for the opinion and all other evidence in the case. You
23 should not, however, accept a witness's testimony just because
24 he or she is an expert. Nor should you substitute such
25 testimony for your own reason, judgment, and common sense.

1 Again, you alone decide how much of any witness's
2 testimony to believe, and how much weight it should be given.

3 You have heard the testimony of people who work in law
4 enforcement or who are employed by the federal or state
5 government. The fact that someone may be employed as a law
6 enforcement or other government official does not mean that his
7 or her testimony is necessarily deserving of more or less
8 consideration or greater or lesser weight than that of other
9 witnesses.

10 Further, it is quite legitimate for opposing counsel
11 to try to attack the credibility of a witness who is a law
12 enforcement or other government official on the grounds that
13 his or her testimony may be colored by personal or professional
14 interest in the outcome of the case.

15 As with all witnesses, it is your decision, after
16 reviewing all of the evidence, whether to accept the testimony
17 of the witness in whole or in part or not at all and give that
18 testimony whatever weight, if any, you find it deserves.

19 You've heard testimony that law enforcement conducted
20 certain tests and you have heard the results of those tests.
21 You may consider that testimony as you would any other evidence
22 and give it such weight as you believe it may deserve under the
23 circumstances. Likewise, you may make reasonable inferences
24 from the fact that certain tests were inconclusive, that
25 certain tests were not conducted, or that certain investigative

1 techniques were not used. Any such inferences, however, should
2 not be based on unfounded speculation or conjecture about what
3 the results of such tests or techniques might have been. There
4 is no legal requirement that the government use any specific
5 investigative techniques or tests or all possible tests or
6 techniques to prove its case.

7 You have heard the testimony of a witness, Dennis
8 Martin, who testified to participating in the robbery at issue
9 in this case. Mr. Martin entered into a plea and cooperation
10 agreement with the government. He and his family have already
11 received some benefits from the government and he may receive
12 other benefits such as a reduction in his sentence if certain
13 conditions are satisfied.

14 Some people in this position are entirely truthful
15 when testifying. Still, you should consider the testimony of
16 Mr. Martin with particular care and caution. He may have had a
17 reason to make up stories or to exaggerate what others did
18 because he wants to help himself. You must determine whether
19 his testimony was affected by any interest in the outcome of
20 this case, any prejudice for or against the defendant, or by
21 any of the benefits he or his family have received or that he
22 hopes to receive from the government as a result of entering
23 into a cooperation agreement. You may consider a guilty plea
24 and the terms of a cooperation agreement in assessing the
25 credibility of a witness that has pled guilty to an offense,

1 but you are not to consider Mr. Martin's guilty plea as
2 evidence against Mr. Carter in any way. In other words, you
3 may not infer that Mr. Carter engaged in criminal conduct or
4 had criminal intent on the basis that someone else pled guilty
5 to the same crimes that he is charged with.

6 It is for you to decide whether Mr. Martin testified
7 truthfully as his cooperation agreement requires, whether to
8 accept all, part or none of his testimony, and what weight, if
9 any, to give to that testimony.

10 You have heard evidence that Mr. Martin has been
11 convicted of a crime. You may consider that evidence, together
12 with other pertinent evidence, in deciding how much weight to
13 give to his testimony.

14 Testimony by a witness as to identity must be received
15 with caution and scrutinized with care. The government's
16 burden of proof extends to every element of each crime charged,
17 including the burden of proving beyond a reasonable doubt the
18 identity of an alleged perpetrator of an offense.

19 In evaluating the accuracy of an eyewitness
20 identification, you may consider the risks of identification or
21 misidentification under stress and the influence of suggestive
22 identification procedures.

23 Although the government is required to prove that the
24 defendant is guilty beyond a reasonable doubt, the government
25 is not required to call all possible witnesses who may have

1 some knowledge about the facts of the case or to produce all
2 possible documents which may bear on the case. You must decide
3 whether the government has met its burden based on the evidence
4 that has been presented.

5 Charts or chalks prepared by the government were shown
6 to you during the trial for purposes of explanation or
7 illustration. You will not have the chalks or charts with you
8 during your deliberations because they are not themselves
9 evidence or proof of any facts. You may, however, consider the
10 testimony given in connection with those materials.

11 You have heard recordings of conversations and seen
12 transcripts of those conversations. The tapes will be
13 available to you in the jury room. I remind you that the
14 evidence is what is on the tapes. The transcripts were to help
15 you understand what was said on the tapes. Any time there is a
16 variation between a tape and a transcript, you must be guided
17 solely by what you heard on the tape and not by what you saw in
18 the transcript. Again, it is what you hear on the tape that is
19 evidence, not what's on the transcript.

20 As I indicated at the beginning of trial, you have
21 been permitted to take notes, but some cautions apply. You
22 should bear in mind that not everything that is written down is
23 necessarily what was said. When you return to the jury room to
24 discuss the case, do not assume simply because something
25 appears in somebody's notes that it necessarily took place in

1 court. Notes are an aid to recollection, nothing more; the
2 fact that something is written down does not necessarily mean
3 it is necessarily accurate.

4 The numbers assigned to the exhibits are for
5 convenience and in order to ensure an orderly procedure. You
6 should draw no inference from the fact that a particular
7 exhibit was assigned a particular number or that there may be
8 gaps in the number sequence, and it makes no sense difference
9 whether an exhibit was introduced by the government or the
10 defendant.

11 Some of the people who may have been involved in the
12 events you have been hearing about are not on trial. There is
13 no requirement that all members of a conspiracy be charged and
14 prosecuted or tried together in one proceeding. Your task is
15 limited to considering the charges contained in the indictment
16 and only as to the defendant before you.

17 This case, like most criminal cases, began with an
18 indictment. The indictment is not evidence or proof of guilt.
19 The indictment is simply an accusation -- it is the means by
20 which defendants are charged with crimes and brought before
21 this court.

22 The indictment in this case charges the defendant with
23 five separate offenses.

24 Count One charges Mr. Carter with conspiring to
25 interfere with commerce by robbery.

1 Count Two charges him with interfering with commerce
2 by robbery. That is committing the actual robbery, rather than
3 just agreeing to commit the robbery.

4 In Count Three of the indictment, Mr. Carter is
5 charged with discharging, brandishing, using, or carrying a
6 firearm in relation to the robbery or aiding and abetting the
7 discharge, brandishing, use or carrying of the firearm.

8 Lastly, in Counts Four and Five of the indictment,
9 Mr. Carter is charged with possessing a firearm or ammunition
10 after having been previously convicted of a crime that is
11 punishable by imprisonment for more than a year.

12 The defendant is not on trial for any act or any
13 conduct not specifically charged in the indictment.

14 The indictment alleges that the conspiracy charged in
15 Count One took place on or about January 26, 2019 to on or
16 about March 13, 2019. The other counts each allege that the
17 offense took place on or about January 26, 2019. Where the
18 indictment charges that a crime is committed on or about a
19 certain date or dates, the government must prove beyond a
20 reasonable doubt that the crimes were committed on a date
21 reasonably near the date alleged in the indictment, but it is
22 not necessary for the government to prove that the crimes were
23 committed precisely on the date charged.

24 In determining whether the defendant conspired as
25 charged, you need not find that the conspiracy existed during

1 the entire period charged. It is sufficient that you find that
2 the conspiracy was in existence during the approximate time
3 period alleged in the indictment and that the defendant was a
4 member of the conspiracy during at least some of that period.

5 All right. I'm going to now turn to the law
6 applicable to each of the five counts. It can be a little
7 dense. So I'm going to give you fifteen seconds to stand up,
8 stretch, refocus yourself and we'll get going on that. So a
9 little break. No one's going to do it?

10 Count One, conspiracy to interfere with commerce by
11 robbery.

12 As I said, the defendant is charged in Count One
13 conspiring to interfere with commerce by robbery and then
14 charged in Count Two with actually committing or aiding and
15 abetting the commission of the robbery. These are different
16 offenses with different elements that need to be proven beyond
17 a reasonable doubt, although there is obviously some overlap in
18 the elements of each offense. I will first address the
19 conspiracy count and then the crime of interfering with
20 commerce by robbery.

21 The defendant is accused of the crime of conspiring to
22 commit a robbery that would have had the effect of obstructing,
23 delaying or affecting interstate commerce. For you to find the
24 defendant guilty of this crime, you must be convinced that the
25 government has proven each of the following things beyond a

1 reasonable doubt:

2 First, that the agreement specified in the indictment,
3 and not some other agreement or agreements, existed between at
4 least two people to commit a robbery that, if successful, would
5 have had an effect on interstate commerce.

6 And second, that the defendant willfully joined the
7 agreement.

8 A conspiracy is an agreement, spoken or unspoken. The
9 conspiracy does not have to be a formal agreement or involve
10 everyone sitting down together and working out all of the
11 details.

12 But the government must prove beyond a reasonable
13 doubt that those who were involved shared a general
14 understanding about the crime. Mere similarity of conduct
15 among various people, or the fact that they may have associated
16 with each other or discussed common aims and interests does not
17 necessarily establish proof of the existence of a conspiracy,
18 but you may consider such factors.

19 To act willfully means to act voluntarily and
20 intelligently and with the specific intent that the underlying
21 crime be committed -- that is to say, with bad purpose, either
22 to disobey or disregard the law -- not to act by ignorance,
23 accident, or mistake. The government must prove two types of
24 intent beyond a reasonable doubt before the defendant can be
25 said to have willfully joined the conspiracy: an intent to

1 agree and an intent, whether reasonable or not, that the
2 underlying crime be committed. Mere presence at the scene of a
3 crime is not alone enough, but you may consider it among other
4 factors. Intent may be inferred from the surrounding
5 circumstances.

6 Proof that the defendant willfully joined in the
7 agreement must be based upon evidence of his own words and/or
8 actions. You need not find that the defendant agreed
9 specifically to or knew all of the details of the crime, or
10 knew every other co-conspirator or that he participated in each
11 act of the agreement or played a major role, but the government
12 must prove beyond a reasonable doubt that he knew the essential
13 features and general aims of the venture. Even if the
14 defendant was not part of the agreement at the very start, he
15 can be found guilty of conspiracy if the government proves that
16 he willfully joined the agreement later. On the other hand, a
17 person who has no knowledge of a conspiracy, but simply happens
18 to act in a way that furthers some object or purpose of the
19 conspiracy, does not thereby become a co-conspirator. The
20 government does not have to prove that the conspiracy succeeded
21 or was achieved. The crime of conspiracy is complete upon the
22 agreement to commit the underlying crime, in this case
23 interference with commerce by robbery.

24 The term "interstate commerce" means commerce between
25 any point in the state and any point outside the state. It is

1 only necessary that the government prove beyond a reasonable
2 doubt that there's a realistic probability that the crime as
3 charged in the indictment had some slight or minimal effect on
4 interstate commerce, or the potential for such an effect. It
5 is not necessary for you to find that the defendant knew or
6 intended that his actions would affect interstate commerce.
7 This definition of interstate commerce applies to both Counts
8 One and Two.

9 "Robbery" means unlawfully taking or obtaining
10 personal property from another, against his will, by means of
11 actual or threatened force or violence, or fear of injury to
12 his person or property or property in his custody or
13 possession. This definition also applies to both Counts One
14 and Two.

15 In Count Two, the defendant is accused of the crime of
16 actually committing a robbery that had the effect or would have
17 had the effect of obstructing, delaying or affecting interstate
18 commerce. For you to find the defendant guilty of this crime,
19 you must be convinced that the government has proven each of
20 the following things.

21 First, that the defendant knowingly and willfully
22 obtained property from the T-Mobile store located at 521
23 Belmont Street in Brockton.

24 Second, that the defendant did so by means of robbery.

25 Third, that the robbery affected interstate commerce.

1 Again, interstate commerce and robbery have the same
2 meanings as we discussed with regard to Count One. A robbery
3 is completed as soon as property is taken. It does not matter
4 if the property is recovered or later returned.

5 As I will explain in greater detail shortly, there are
6 two other means by which the defendant may be found guilty of
7 Count Two even if he did not personally commit all the
8 essential elements of the offense. First, if the government
9 proves beyond a reasonable doubt that the defendant conspired
10 to commit the crime and knew that it was reasonably foreseeable
11 the crime would be committed by a co-conspirator. This is
12 known as "Pinkerton liability."

13 Second, the defendant may be found guilty of this
14 crime if the government proves beyond a reasonable doubt that
15 the defendant aided and abetted the commission of the crime.
16 This means that he took an affirmative step to help or cause
17 the crime to be committed, and intended that the crime be
18 committed by another or that he caused the crime to be
19 committed. We'll get back to Pinkerton and aiding and abetting
20 in just a minute.

21 In Count Three, the defendant is charged with the
22 crime of brandishing, discharging, using, or carrying a firearm
23 during and in relation to a crime of violence. For you to find
24 the defendant guilty of this crime, you must be satisfied that
25 the government has proven each of the following things beyond a

1 reasonable doubt:

2 First, that the defendant committed the crime of
3 interference with commerce by robbery, described in Count Two,
4 and second that the defendant knowingly used or carried a
5 firearm during and in relation to that robbery.

6 I instruct you that interference with commerce by
7 robbery as charged in Count Two of the indictment is a crime of
8 violence.

9 The word "knowingly" means an act was done voluntarily
10 and intentionally, not because of mistake or accident.

11 To "carry" a firearm means to move or transport the
12 firearm on one's person or in a vehicle or container. It need
13 not be immediately accessible. To "use" a firearm means to
14 employ the firearm actively, such as to brandish, display,
15 strike with, discharge or attempt to discharge it, or even to
16 refer to it in a way calculated to effect the underlying crime.
17 "During and in relation to" a crime means that the firearm must
18 have played a role in the crime or been intended by the
19 defendant to play a role in the crime.

20 With respect to a firearm, the term "brandish" means
21 to display all or part of the firearm, or otherwise make the
22 presence of the firearm known to another person, in order to
23 intimidate that person, regardless of whether the firearm is
24 directly visible to that person. The brandishing of a firearm
25 must be done intentionally, which means that it cannot be

1 accidentally displayed or made known to another person.

2 "Discharge" means that the weapon was fired.

3 Discharge does not require an intent to fire the weapon, and
4 includes accidental discharges during the crime of violence.

5 As with Count Two, the defendant can also be found
6 guilty based on "Pinkerton liability" or aiding and abetting
7 even if he personally did not commit all of the elements of the
8 charged offense.

9 First, under "Pinkerton," the defendant can be found
10 guilty if the government proves beyond a reasonable doubt that
11 the defendant conspired to commit the underlying crime and knew
12 that it was reasonably foreseeable that the underlying crime
13 would be committed by a co-conspirator. For this offense, it
14 must have been reasonably foreseeable to the defendant that a
15 co-conspirator would use, carry, brandish, or discharge the
16 firearm during the commission of the robbery. Again, this is
17 known as "Pinkerton liability." I will specifically instruct
18 you on this form of liability in greater detail shortly.

19 Second, the defendant may be found guilty as an aider
20 and abettor if the government proves beyond a reasonable doubt
21 that the defendant took an affirmative step to help or cause
22 the crime to be committed, and intended that the crime be
23 committed by another or that he caused the crime to be
24 committed by another. To find the defendant guilty of aiding
25 and abetting the crime of using, carrying, brandishing, or

1 displaying a firearm during and in relation to a crime of
2 violence, the government must prove that the defendant knew the
3 firearm would be used, carried, brandished, or discharged, or
4 caused it to be used, carried, brandished, or discharged during
5 the commission of the crime of violence.

6 Again, we'll get back to aiding and abetting and
7 "Pinkerton" in a minute.

8 If you find the defendant guilty of using or carrying
9 the firearm during the commission of a crime of violence, you
10 must then determine whether or not the government has proven
11 beyond a reasonable doubt that the firearm was also brandished
12 or discharged during and in relation to the crime. You'll be
13 asked to indicate on the verdict form whether you found the
14 firearm to have been brandished or discharged or both.

15 Again, for you to find that the firearm was
16 discharged, you do not need to find that the defendant
17 specifically intended that the firearm be discharged during the
18 commission of the offense. You are simply to consider whether
19 the government has proven beyond a reasonable doubt that the
20 firearm was discharged, and not whether the discharge was
21 accidental or intentional.

22 Now to get back to "Pinkerton" liability and aiding
23 and abetting.

24 "Pinkerton liability" is only relevant if you find the
25 defendant guilty of the conspiracy charged in Count One.

1 If, consistent with my instructions, you find beyond a
2 reasonable doubt that the defendant was guilty of the
3 conspiracy count (Count One), then you may also, but are not
4 required to, find him guilty of the substantive crimes charged
5 in Count Two and Count Three if you find each of the following
6 elements beyond a reasonable doubt:

7 First, that someone committed the substantive crime
8 charged in Counts Two and/or Three.

9 Second, that the person you find committed the
10 substantive crime was a member of the same conspiracy as the
11 defendant.

12 Third, that this co-conspirator committed the
13 substantive crime in furtherance of the conspiracy.

14 Fourth, that the defendant was a member of this
15 conspiracy at the time the substantive crime was committed; and

16 Fifth, that the defendant could reasonably have
17 foreseen that one or more of his co-conspirators might commit
18 the substantive crime.

19 If you find all of these elements to exist beyond a
20 reasonable doubt, then you may find the Defendant guilty of the
21 substantive crime charged even though he did not personally
22 participate in the acts constituting the crime or did not have
23 actual knowledge of them.

24 If, however, you are not satisfied as to the existence
25 of any one of these five elements, then you may not find the

1 defendant guilty of the particular substantive crime unless the
2 government proves beyond a reasonable doubt that he personally
3 committed that substantive crime or aided and abetted in its
4 commission.

5 To "aid and abet" means intentionally help someone
6 else commit the charged crime. To establish aiding and
7 abetting, the government must prove beyond a reasonable doubt:

8 First, that the crime of interference with commerce by
9 robbery, and/or the crime of discharging, brandishing, use and
10 carrying was actually committed by someone. This person or
11 persons are referred to as the principal or principals.

12 Second, that Mr. Carter took an affirmative act to
13 help or cause the commission of either crime; and

14 Third, that he intended to help or cause the
15 commission of either crime.

16 The second element, the "affirmative act" element, can
17 be satisfied without proof that the defendant participated in
18 each and every element of the crime charged. It is enough if
19 he assisted in the commission of the robbery and/or with the
20 discharging, brandishing, use or carrying of the firearm or
21 caused either offense to be committed.

22 The third element, the "intent" element requires that
23 the defendant had advanced knowledge of the facts that make the
24 conduct of the principal or principals criminal. "Advanced
25 knowledge" means knowledge at a time the defendant can opt to

1 walk away.

2 As I mentioned before, for the defendant to be
3 convicted of aiding and abetting the crime of carrying,
4 brandishing, or discharging a firearm during a crime of
5 violence, the government must prove beyond a reasonable doubt
6 that the defendant knew a firearm would be carried, brandished,
7 or discharged during the commission of the crime of violence.

8 A general suspicion that an unlawful act may occur or
9 that something criminal is happening is not enough. Mere
10 presence at the scene of the charged robbery and knowledge that
11 the robbery is being committed or that a firearm was being
12 discharged, brandished, used or carried during the commission
13 of the robbery is also not sufficient to constitute aiding and
14 abetting. But you may consider these things among other
15 factors in determining whether the government has met its
16 burden.

17 If a defendant willfully "causes an act to be done,"
18 by another, the defendant is responsible for those acts as
19 though he personally committed them. To establish that the
20 defendant caused an act to be done, the government must prove
21 beyond a reasonable doubt:

22 First, that another person or persons committed a
23 robbery that affected interstate commerce, and/or used,
24 brandished or discharged a firearm during a crime of violence.

25 And second, that the defendant willfully caused these

1 acts, even though he did not personally commit these acts.

2 The defendant need not perform the crime, be present
3 when it is performed, or be aware of the details of its
4 execution to be guilty of causing an act to be done by another,
5 but a general suspicion that an unlawful act may occur or that
6 something criminal is happening is not enough. Likewise, mere
7 presence at the scene of the robbery and knowledge that the
8 robbery is being committed are also not sufficient to establish
9 causing an act to be done through another. But you may
10 consider these among other factors.

11 An act is done "willfully" if done voluntarily and
12 intentionally with the intent that something the law forbids be
13 done -- that is to say with bad purpose, either to disobey or
14 disregard the law.

15 Again, for the defendant to be convicted for aiding
16 and abetting the crime of using, carrying, brandishing, or
17 discharging a firearm during a crime of violence, the
18 government must prove that the defendant knew a firearm would
19 be used or carried during the commission of the crime of
20 violence.

21 The defendant is charged in Counts Four and Five with
22 possessing a firearm after having been convicted of a crime
23 punishable by imprisonment for more than one year. Count Four
24 charges possession of a .380 caliber black Ruger, serial number
25 37605289 and 13 rounds of .380 caliber ammunition. Count Five

1 charges the possession of a .9 millimeter silver Armi Fratelli
2 firearm, serial number G11503, and a silver Jennings .22
3 caliber firearm, serial number 290106. For you to find the
4 defendant guilty of either count, you must be satisfied that
5 the government has proven each of the following things beyond a
6 reasonable doubt:

7 First, that the defendant has been and knows that he
8 has been convicted of a felony, that is, a crime punishable by
9 imprisonment for a term exceeding one year. This element has
10 been stipulated to. You may not, however, infer that
11 Mr. Carter engaged in the criminal conduct alleged in this
12 indictment or that it is more likely that he committed the
13 charged crimes based on the fact that he has been previously
14 convicted of another felony. Other than as satisfying this
15 element of the offense, the fact of Mr. Carter's prior
16 conviction should not be considered by you for any other
17 purpose.

18 Second, that after this conviction, the defendant
19 knowingly possessed a firearm or ammunition charged in either
20 or both of Counts Four and Five; and

21 Third, that the firearm or ammunition you found the
22 defendant to have possessed moved in interstate commerce, that
23 is, from one state to another or from a foreign country into
24 the United States at any time after it was manufactured. The
25 travel need not have been connected to the charge in the

1 indictment, need not have been in furtherance of any unlawful
2 activity, and need not have occurred while the defendant
3 possessed the firearm or ammunition.

4 The term "firearm" means any weapon which will or is
5 designed to expel a projectile by the action of an explosive.
6 The term "firearm" also includes the frame or receiver of any
7 such weapon.

8 Again, the word "knowingly" means that the act was
9 done voluntarily and intentionally, not because of mistake or
10 accident. The term "possess" means to exercise authority,
11 dominion, or control over something. It is not necessarily the
12 same as legal ownership.

13 Possession includes both actual and constructive
14 possession. A person who has direct physical control of
15 something on or around his person is in actual possession of
16 it. A person who is not in actual possession, but has both the
17 power and intention to exercise control over something is in
18 constructive possession of it. A person must have actual
19 knowledge of the weapon in order to have constructive
20 possession of it. Briefness of contact alone does not preclude
21 a finding of possession. Whenever I use the term "possession"
22 in these instruction, I mean actual as well as constructive
23 possession.

24 Possession also includes both sole and joint
25 possession. If one person alone has actual or constructive

1 possession, possession is sole. If two or more persons share
2 actual or constructive possession, possession is joint.
3 Whenever I have used the word "possession" in these
4 instructions, I mean joint as well as sole possession.

5 Because the defendant is charged with possessing
6 different firearms in separate counts, for you to find the
7 defendant guilty of both counts, you must find that the
8 defendant possessed the firearm and ammunition -- the firearm
9 or ammunition charged in Count Four at a separate time or place
10 than the firearms charged in Count Five.

11 All right. My final instructions have to do with how
12 you're going to deliberate. I'll give you those after
13 closings, but because I have now addressed you directly, I need
14 to give the parties an opportunity, once again, to object to
15 anything I've said to give me a chance to correct it if I've
16 gotten anything wrong.

17 THE COURT: Do you want to be seen at sidebar?

18 MR. SULTAN: No, Your Honor.

19 THE COURT: Do you want to be seen at sidebar?

20 MR. MALLARD: No, Your Honor.

21 THE COURT: Okay. I'm going to release you for lunch.
22 Hope your lunch is up there.

23 THE CLERK: It will be, or soon.

24 THE COURT: Karen says it will be.

25 Can you guys do a half hour of lunch today, or would

1 you like the full 45 minutes? Half hour? So we will come back
2 in half an hour, which is 20 past 12:00. We'll get right to
3 closings. All right?

4 THE CLERK: All rise for the jury.

5 (Jury exits.)

6 THE COURT: All right. See you guys back in half an
7 hour.

8 (A recess was taken 11:50 a.m. to 12:20 p.m.)

9 MR. SULTAN: Your Honor, I feel the need to put
10 something else on the record to follow up our sidebar. The
11 government accused me being underhanded. Your Honor accused me
12 of doing something inappropriate.

13 I try to be a very zealous advocate. I always try to
14 follow the Rules. I always try to be ethical. I don't believe
15 I was underhanded or inappropriate. I didn't accuse anybody of
16 being underhanded by putting in a redacted document, and I just
17 think that what I did was perfectly appropriate within the
18 bounds of the Rules.

19 And I think that I shouldn't have been accused of that
20 by the government or by the Court. And I just want to put that
21 on the record, Your Honor.

22 THE COURT: Well, I stopped him from calling you
23 underhanded and countermanded their description of
24 "underhanded." Reasonable minds may differ. I think that what
25 you did served -- crossed the line on the zealousness thing,

1 but you may feel otherwise.

2 The conversation was private. The evidence came in.
3 The government effectively cross-examined on the point. So I'm
4 just going to call it "no harm/no foul."

5 I would normally say this after closings and give my
6 assessment of the case, but I think this case by both sides has
7 been exceptionally well tried. And I think that everybody has
8 been very respectful of everybody else. I think the trial has
9 been superclean, and for which I thank you all. So I'm going
10 to --

11 MR. SULTAN: I appreciate that, Your Honor, but
12 there's now a record where the Court has accused me of doing
13 something inappropriate. And I just think that that's wrong,
14 and I would ask the Court to reconsider that characterization
15 of what I did.

16 THE COURT: Linda, put that sidebar under seal,
17 please.

18 THE CLERK: It was Kathy.

19 THE COURT: Linda, can you communicate with Kathy.
20 And the court reporter can get it under seal.

21 MR. MALLARD: I just want to note, Your Honor, I did
22 speak to Mr. Sultan afterwards. I apologized for the comment,
23 and it was wrong-minded at the time.

24 THE COURT: It's frustrating for me because it
25 happened right at the end of the trial. I'm left with very few

1 options if I, in fact, am right, and that was not -- was not
2 how it should have been done. But look it's no harm/no foul.
3 I think you've done an excellent job representing him, a really
4 excellent job.

5 The cross-examination of the DNA expert was honestly
6 one of the best cross-examinations I've ever seen. It is what
7 it is. It's the woof and warp of the trial. I have my view of
8 how that could have been better handled.

9 You think it was appropriate. They were probably just
10 frustrated. They didn't have a chance to call a rebuttal
11 witness, although I think they leveled the field on that with
12 the redirect. I'll seal the sidebar but --

13 MR. SULTAN: Thank you, Your Honor.

14 THE COURT: Karen, can you go get them, please.

15 THE CLERK: All rise for the jury.

16 (The Jury is present for the following.)

17 THE CLERK: Court is in session. Please be seated.

18 THE COURT: When you're ready, Mr. MacKinlay.

19 MR. MacKINLAY: May we have the monitors for the
20 members of the jury?

21 THE COURT: Yes. When you're ready.

22 GOVERNMENT CLOSING ARGUMENT

23 BY MR. MacKINLAY:

24 That man is guilty of all five of the crimes for which
25 he's charged, not because I'm telling you so but because the

1 evidence did. Witness after witness, exhibit after exhibit
2 that we put before you all led to the inescapable conclusion:
3 He orchestrated, he planned, he participated in a robbery of
4 the T-Mobile store. And he chose and recruited his little
5 brother, Darius, to be part of the robbery crew.

6 Now, my co-counsel promised you at the start last week
7 that we were going to produce evidence to establish the
8 charges. We delivered the evidence, evidence in a variety of
9 forms. You heard from not one but two eyewitnesses to the
10 crime, Gardy Dertelus, Officer Robinson. You heard from a
11 participant in the crime.

12 You heard evidence in a variety of forms, including video
13 evidence, records, forensic evidence, including DNA, ballistics
14 evidence, fingerprint evidence, cell phone evidence, including
15 cell phone records and tracking, which created an avalanche of
16 supporting evidence all fitting together for one conclusion:
17 He's guilty of the crimes charged.

18 You also heard 3Si. Who knew, who knew that they use
19 these devices, right? The 3Si tracker, the tracker that looks
20 like an iPhone, any other iPhone, the tracker that made its way
21 into the bag when they robbed the T-Mobile store at 521 Belmont
22 Street. It's been said that the tracker is the reason we're
23 here. Well, it's one of the reasons we're here.

24 But there's other reasons we're here. Because not only
25 was Gardy Dertelus working that night in the T-Mobile store,

1 not only was Officer Robinson working that night on duty and
2 patrolling the city of Brockton, the police officers from the
3 Brockton Police Department and other police departments who
4 supported also were working, working together to hold everybody
5 involved in the robbery accountable.

6 What did you hear that they did in the aftermath of the
7 robbery with the assistance of the 3Si, the tracking device?
8 Dogs, search patterns, helicopters, all kinds of people
9 converging on the area around Carl Avenue where the car crashed
10 and the occupants took off.

11 One person got away, though, and he had help. He had
12 help. We'll talk about that in a moment.

13 I want to start with Officer Robinson. Officer Robinson
14 came here and told you a few things that I want to remind you
15 of. He said he never lost sight of the white Chevy Malibu from
16 the time that he saw the car until -- the high-speed chases
17 through the roads until the car crashed and the occupants fled.
18 He never lost sight.

19 He told you something else, and I want you to start with
20 this before we review the rest of the evidence. Four people
21 fled that car. Four people, right? You remember him
22 testifying to that. Four doors open up, and four people took
23 off. He said -- again, your memory of the evidence controls,
24 but he stays right behind the vehicle with his headlights
25 flashing out, the white Malibu prior to the doors opening.

1 Ask yourself this about Officer Robinson: How many times
2 do you think he's going to relive that moment in his head? How
3 many times?

4 Robbery crew headed by him of shooting trying to take his
5 life, and he gets out of the car, bravely I would submit, to
6 chase after them. And what does he see? A fourth door. He
7 only saw three people up to that point. Remember? One person
8 was ducking down on the left side.

9 What was his testimony about the fourth person? "I was
10 alarmed. I was concerned for my safety." Is that fact burned
11 into his memory because of the seriousness of the incident and
12 the sheer terror he faced? I submit to you it was. Four
13 people fled the car. He's the fourth.

14 How did he get away? One person, James Boddie, 82 Carl
15 Avenue, a friend of his, James Boddie. We know that he got
16 there because the records on the left-hand side show phone
17 calls after the chase concluding, one at 7:46 for nine minutes
18 between the defendant's phone and Boddie's phone with Boddie
19 directing him real time, "Hey, stay on the line. Stay on the
20 line. I'll tell you how to get to my place at 82 Carl Street."

21 The car crashed just up the street. Nine minutes, phone
22 calls between defendant and James Boddie, and then they stop.
23 What does it tell you when they're speaking on multiple
24 occasions in that time frame, and then they stop? Well,
25 they're together. There's no need to call at that point,

1 right? They're at his house.

2 Now, how do you know that? How do you know he's at the
3 house? Well, at 8:11 -- so that call ended at 7:55 p.m.
4 Remember the testimony of Chris Malm, the Airwing? Remember
5 the Airwing, the helicopter flew down from Lawrence, 8:11.
6 8:11 is my memory of the testimony that he arrived.

7 Ask yourself when you saw that infrared camera evidence
8 tracking through the woods if there was anybody there. You
9 would think you would have found him. I mean, he found
10 coyotes, he found deer, but he didn't find Diovanni. Why?
11 He's inside the house at 82 Carl Avenue with Boddie's
12 assistance. That's why.

13 That brings us to Dennis Martin. Dennis Martin, in an
14 effort to hold everybody accountable for their role in the
15 robbery, Dennis Martin. First and foremost before we talk
16 about his testimony, who actually picked Dennis Martin? Who
17 picked him? He picked him, picked him to be part of his
18 robbery crew, remember?

19 Phone calls -- "What's up" -- between Rosser-Stewart and
20 Martin. "What's up," we learned, means, "Hey, let's go do a
21 robbery." Who knew? He picked him with his associate,
22 co-conspirator Rosser-Stewart. He picked him to be part of the
23 robbery crew.

24 And, also, if you think about it, Martin presented himself
25 to law enforcement at the time of his arrest. What do I mean

1 by that? Minutes after the robbery, right, minutes after the
2 robbery, when the car crashes, which we're going to go through,
3 and everybody flees, as Robinson told you, where is Dennis
4 Martin arrested? A short distance away hiding behind a shed,
5 doesn't have his shoes on. You remember the testimony.

6 What's the two things that he did when he was first
7 confronted by the police? First thing he said, really
8 important, "I didn't shoot the police." The second thing he
9 said, "Let me give you a description of the people who were
10 involved."

11 Now, he had heard that Darius Carter had already been
12 arrested so he knew there was only two more left. What does he
13 do? He provides descriptions of both of them, Rosser-Stewart
14 and the defendant, which is put out over the radio broadcast to
15 the others searching. What did we learn about them? Six foot
16 one, long beard, light complexion. Does it sound like him?

17 He also looked at a photo of Rosser-Stewart that was
18 provided to him by a female officer, Shannon Morency. Remember
19 the photograph of Rosser-Stewart, and he identified he was one
20 of the co-conspirators of the robbery crew. So before any
21 involvement of any significant nature with the government,
22 Martin had already provided help on the scene.

23 Now, no one is asking you to like the man. He is a type
24 of a person that joined the robbery crew on two words. "What's
25 up?" He's a robber. He's a drug dealer. And no doubt he

1 caught -- was caught, and that played a significant role in
2 assisting the government, as well. He was caught on the scene.
3 But he didn't shoot the police. What is his explanation for
4 not shooting at the police and doesn't have a ring of truth?
5 What does he say? "More than I bargained for. More than I
6 bargained for. I was in for robbery. I was not involved with
7 this crew to shoot at the police."

8 No evidence to say that he did. His firearm has
9 ammunition in it. No evidence of shell casings or firing out
10 of the left side of the car where he was sitting where his
11 identification is.

12 We're asking you to look at his evidence, his testimony,
13 and review some of the evidence that we've introduced to see
14 how it fits, to see how it tends to support it, to see how it
15 corroborates it.

16 But remember something, the police, they kept
17 investigating. They didn't stop. They kept investigating.
18 Much of the evidence that was developed and presented to you
19 was really not from that night. The tracking evidence,
20 forensic evidence, cell phone records all developed after the
21 fact.

22 The police kept investigating. The ATF kept
23 investigating. What did they do? They determined and
24 collected evidence for you to consider to see how it all fits.

25 Let's start with the white Chevy. He rented it. You

1 heard from the Hertz folks, and you heard from Carshana Graham.
2 Reluctantly she told you that she rented the car for him. She
3 explained that she did that. I'm not going to use it. He was
4 going to use it. And she said -- again, your memory
5 controls -- that she thought she would have said to him words
6 to the effect of, "Hey, no one else can drive that car because
7 you're the only authorized driver."

8 Okay. That's an important factor and a reason I'm going
9 to get to in a minute here. One authorized driver, Carshana
10 Graham, not involved. Second authorized driver, defendant,
11 involved.

12 What else tells you that the car was driven by the
13 defendant? Well, let's think about it. The other people in
14 the car, remember the people in the car, Darius Carter,
15 Rosser-Stewart, and Dennis Martin, these four. You have
16 evidence from the Registry of Motor Vehicles establishing that
17 one person in the car had a driver's license, the defendant.
18 No one else had a driver's license. No one else is an
19 authorized user.

20 So you say, well, maybe somebody could have just jumped in
21 and driven the car. Really now? What kind of plan would it be
22 if you made yourself and your robbery crew open to being
23 stopped by the police because the person driving couldn't
24 drive. Of course, they didn't do that. Of course, it was a
25 driver with a driver's license. Of course, it was Diovanni

1 Carter.

2 Remember, too, they had to get right before they went
3 down. Remember the words "get right." You heard that from
4 Dennis Martin in the conversation of getting ready, preparing.
5 He described it as preparing to do the robbery. "Get right"
6 also meant go get the guns. More reason why they're going to
7 be careful driving to a robbery with guns in their car, and
8 they were going to have someone licensed and authorized to
9 drive that vehicle. This evidence helps support who was
10 driving that vehicle that night.

11 You also know the defendant possessed the vehicle because
12 Samuel Files from the BCI came here and told you he got his
13 fingerprint, which was lifted by Dana Fowler, from the exterior
14 of the car. Remember that? I believe it was the right rear
15 section of the car. And he individualized that to the
16 defendant.

17 I'm not surprised he's driving the car. This car is
18 rented for him, but more evidence that he possessed it. And
19 certainly you heard about another print from an Andy Sousa, who
20 has nothing to do with this. In fact, his print was in the
21 system because of his military involvement.

22 Martin told you that the defendant was a leader of the
23 plan -- leader of the group who made the plan. What evidence
24 do you have to support that? Well, he called it an easy hit
25 when he talked to them, the defendant, an easy hit, meaning an

1 easy place to rob. And how did he know it was an easy hit?

2 Well, the tracking evidence shows that his phone tracked
3 at 5:00 approximately in the morning from Boston to Brockton,
4 and while there, did something that he did for the first time
5 in months of records leading up to that point -- remember you
6 heard from Special Agent Kelsch from the ATF -- that the Google
7 search history of phones attributed to him.

8 What did you learn about that search? You learned that he
9 Googled "T-Mobile," the place of the robbery. You learned he
10 Googled "Xtreme Car Rental," which is right in the same area of
11 the robbery. You can see in the picture the T-Mobile is down
12 to your left, and the Xtreme Car Rental is right up here on the
13 right-hand side.

14 And the tracking evidence of his phone shows that he went
15 from Boston to Brockton. And, members of the jury, he cased
16 the joint in simple terms. He did his research. He cased the
17 joint and said, "It's an easy hit." We know he's the leader
18 because the records, tracking records, as well as the Google
19 records, support it.

20 You also remember that Martin said Stewart called him,
21 signing the whole plan off, "What's up?" It was around 6:00 in
22 the evening. Phone records -- again, you can match up the
23 numbers, but the phone records show incoming calls from
24 Rosser-Stewart to the number associated with Dennis Martin.
25 That's what he asked him. "Do you want to get involved?"

1 What's up? Let's go get right." The phone records support him
2 saying he was recruited to join the crew.

3 In addition, Martin said that items were worn in the
4 store, particular items. He said Darius Carter wore gloves.
5 He described the particular work gloves that you see there. On
6 the right is where they were found in the car following the
7 apprehension. And the left, you can make it out, they're on
8 his hands as he brandishes the gun and points it in the
9 direction of Gardy Dertelus, just as Martin told you.

10 He also told you that guns were handed out. In
11 particular, a gun -- he said that the gun that was in the
12 possession of Darius was the one on the left, the 9 millimeter
13 Armi Fratelli; the one in the middle with the long magazine is
14 the one that he had, which was handed to him when he got in the
15 car; and the one on the right, he indicated, was the one
16 Rosser-Stewart had in the front seat. He described them. You
17 can see them. We are not going to go through the video of the
18 store, but certainly you can see those weapons in the hands of
19 the individuals inside of the store.

20 The next thing that he told you is they got into the
21 vehicle and drove down to the area of the T-Mobile store.
22 Remember that? And you have a dentist video, and it captured
23 the vehicle, the white Chevy pulling up to the light and
24 stopped. Remember the testimony of Martin? He talked about
25 how he looked over his shoulder and looked in the store.

1 Take a look inside the store when that is occurring. You
2 can actually see Gardy Dertelus in the back of the store. The
3 dentist video establishes what he said, what Martin said
4 happened at that very time in the car. But what did he say the
5 defendant said at that time? "That's it. It's time. There's
6 only two in the store."

7 Then they made the block and they parked the car and they
8 went in. That's tantamount to the agreement. "It's time.
9 Let's go." And what did the co-conspirators do? They go.
10 Armed, gloved, in they go. One with a bag, Rosser-Stewart.

11 The bag and the guns -- excuse me, the bags were found
12 later. The white bag was the bag that Martin indicated he used
13 to steal the iPhones, assisting in stealing other items from
14 the store, found in the back seat of the car, right where he
15 said. The other bag is the bag Rosser-Stewart carried in the
16 front seat, right where he indicated it was left.

17 What else did he say? "I thought we were going back to
18 Boston, taking a left turn." Do you remember that one section
19 of his testimony? He was on West Elm. He thought he was going
20 to take a left, head up West Street, and go back to Route 24 to
21 Boston to get away. Instead, he went right. We now know why
22 he went right. He was going to James Boddie's house. That was
23 the plan. He wasn't going to share that piece of it with the
24 co-conspirators.

25 But the 3Si tracking supports him testifying to that, as

1 well, because it shows the car, which is tracking -- now, you
2 remember, as soon as they went out of that grid, it
3 automatically started the tracking. And as it started the
4 tracking, it started showing the path of the car with the
5 tracking device in it. It went to the right, West Elm Street,
6 supporting the route described by Martin.

7 And we hit this point in the discussion review that I
8 really want to highlight for you because at this moment all the
9 things line up, and it's just as if the defendant had signed
10 his name to being the driver of the car. What do I mean by
11 that? The 3Si tracker is showing that after the robbery they
12 come out of the store, they've got the guns, they've got the
13 two bags, they run to the car. You saw it on the dentist
14 video. And they get into the vehicle, and they take off. So
15 3Si has them moving.

16 What did Martin say? He testified once we're moving,
17 Diovanni Carter was on the phone to someone named Noons.
18 Remember that? Noons is the black figure there, the
19 silhouette. Noons, that's the number. What about him? He,
20 Martin, hears the defendant talking to Noons saying, "Yeah,
21 I've got 30 or 40 of them. Yeah, line up your people" or words
22 to that effect. He's going to sell the phones. That's why
23 they're doing the robbery. They are looking for a fence,
24 someone to sell the stuff. They have got this fence. It was
25 this guy Noons.

1 So Ryan Burke's tracking of the cell phones is consistent
2 with the car moving in that same location. The 3Si is
3 consistent with it moving at that time, as well, okay, at 7:15.
4 But, also, the phone records indicate that the phone call
5 occurred at that time between Noons and Diovanni Carter's
6 phone. Now, ask yourself this: Isn't that good proof that his
7 phone was used and he was answering the call and he was talking
8 to the fence also showing his leadership?

9 There's more. Remember the call frequency charted with
10 the last witness, how many times people call each other?
11 There's 180 contacts between Noons and Diovanni Carter in just
12 over a month. 180 contacts. It's his guy. He's speaking to
13 his guy. Not anyone else. No one else would be doing that.
14 No one else would be speaking to Noons but the person who
15 routinely spoke to him. He told you with his actions of
16 speaking to the fence while driving away that's consistent with
17 what Martin told you.

18 We continue on. The chase occurs. Robinson is involved.
19 Other officers are involved. Speeds are hitting 60, 70 miles
20 per hour. You know that from 3Si. You know that from Officer
21 Robinson. That's what Martin told you. It continues until
22 they're in an area of Summer Street, and Martin told you he's
23 heard the defendant say words to the effect of, "You've got to
24 get them boys up off me." He explained what he meant by that,
25 what he understood that to mean. "Shoot at the police."

1 Now, something happens right after that. Two people shoot
2 at the police. You know that that occurred, he said that,
3 because it's spurred them to act. It spurred them to do
4 something dramatic, take their loaded weapons and start
5 shooting at the police. He said it. Martin told you it. It
6 has a ring of truth, I submit to you.

7 But the positions within the car as described by Martin
8 are also consistent with the physical evidence.

9 Darius Carter is in the back seat of the car. He had the
10 large silver gun. Rosser-Stewart is in the front seat with the
11 small silver gun. You remember that. Shell casings found, .22
12 shell casings from the small gun in the front seat, consistent
13 with him shooting it.

14 In the back seat they opened the windows, and they leaned
15 out and fired.

16 What do you know about one of the shell casings from the
17 larger gun in the back seat, the 9 millimeter? Well, Baltazar
18 Goncalves woke up the next morning and found it. But not
19 before the night before being in his living room and hearing
20 gunshots ringing out in his neighborhood. Why is it? You
21 heard he didn't go to the window. He stayed inside the house.
22 The next morning he did see people searching, police officers.
23 He found the shell casing in the end of his driveway and turned
24 it into the police.

25 What did the ballisticsian say, Trooper Cochrane? "It's

1 consistent with being fired ballistically from the gun in the
2 back seat," the gun that Darius Carter used.

3 The .22 caliber that was found, as well -- we'll talk
4 about in a moment -- that also is consistent with firing the
5 shell casing in the front -- that was found in the front seat
6 with one exception. Because it's a smaller caliber, he
7 couldn't get as good a definitive result.

8 Now, you also heard a series of evidence. For example,
9 there's no gunshot residue on these individuals. Well, does
10 that really surprise anyone? They're leaning out the window at
11 60 miles an hour shooting at the police. I mean, common sense
12 just dictates that the gunshot residue particles just went
13 right out the window. So they were not captured by the stubs
14 in an effort to do so.

15 You'll also learn there's no fingerprints recovered from
16 the firearms that were recovered. That should come as no
17 surprise, as well. 90 percent of the time you don't get a
18 fingerprint from ballistics evidence. You heard that from two
19 different troopers from the Massachusetts State Police Crime
20 Lab.

21 Then we hit a part of this story that's also corroborated
22 by the evidence. What did Darius Carter report to the Plymouth
23 County Correctional Facility with on his shoulder? He got
24 shot. He had a bullet hole in his shoulder from the front seat
25 passenger, Rosser-Stewart, shooting a small .22 caliber pistol

1 and hit him in the shoulder. There's a picture of the hole
2 going in and out of his shoulder. Does that support Martin
3 saying the locations? Of course it does. Absolutely.
4 Sometimes truth is stranger than fiction.

5 How did the car stop? Who remembers that? How did the
6 car stop? Not some crash, not speed. A neighbor, a neighbor
7 came out, heard the police chasing him, and threw a log in
8 front of the white Chevy as it fled. Crash causing it to hit
9 it -- causing it to crash, damage to the front portion of the
10 vehicle, and a flat tire.

11 Now, how do you know that occurred the way Martin
12 described it? Officer Almeida, detective, the first witness,
13 said he had swerved to avoid it. Something small, something
14 important because it brought the car to a stop and ultimately
15 brought the immediate arrest of three of the four individuals.

16 What about Terrell Jackson? Let's just get this out of
17 the way. His wallet is found in the car. You heard from
18 Martin that he requested to get the wallet from Diovanni
19 Carter. It was left in the car. He told you he left it with
20 his identification. You heard evidence today that that's where
21 it was found, in the left rear where Martin sat with Martin's
22 identification. In it is the identification of Jackson. And
23 then you heard something else. You had his phone number. You
24 heard from Ryan Burke, said his phone was in Boston at 7:10
25 p.m. the night of the robbery. He can't be in two places at

1 once.

2 Now, you say, well, his phone could be. Right, he could
3 be down here doing the robbery. No, no, no. What did the
4 T-Mobile witness tell you? He had to have swiped it. He
5 looked at the records and said, "Terrell Jackson swiped it."
6 He had to physically touch the phone at 7:10 in Boston. That's
7 the end of the conversation relative to Terrell Jackson. He
8 had nothing to do with it.

9 You also know from the phones and a variety of sources,
10 including the records from Express where the defendant worked,
11 well, he applied to work on a Friday, went to work on a Monday,
12 decided he didn't want to go to work anymore and quit, saying
13 he's got a lot going on in his life. Yeah, he sure did.

14 You also heard that the .380 Ruger, the one we described
15 with the long magazine, was handed to him by the defendant.
16 And you heard yesterday from the DNA analyst at the
17 Massachusetts State Police Crime Lab -- and no, we're not
18 asking you to use just that evidence to support the fact that
19 Carter possessed the gun and handed it off. There is other
20 evidence you can look to to support that, as well, including
21 the evidence from Dennis Martin. But she did say and testified
22 that the defendant's DNA was a major profile of handler DNA
23 recovered from the .380 gun.

24 What else about the jail call? This is a call that
25 occurred the very day that Darius Carter -- excuse me, Diovanni

1 Carter was arrested last year, 2019. This is between his
2 brother commenting on the case.

3 (Audio playing.)

4 What is Darius Carter doing? He's trying to get word,
5 to warn his brother, the defendant, to shut his mouth because
6 the co-d, Dennis Martin, the co-defendant is snitching. He's
7 talking to the police. Affirmative evidence of their both
8 involvement in the robbery.

9 Just a couple of comments on the law because, of
10 course, the Court gave you the law in great detail, and I
11 obviously would strongly urge you to listen to her
12 instructions. I want to talk just briefly about a couple of
13 things on how the evidence meets it.

14 The first is on conspiracy in Count 1, conspiracy to
15 commit the robbery, a word or two about a conspiracy. It's
16 just an agreement. Okay. It doesn't need to be a written
17 contract. It doesn't need to be anything formal in nature. It
18 can be, as I described earlier, just going, your actions to
19 follow the plan, which is what happened here both in Boston
20 when they got in the car and when they got to the T-Mobile when
21 they saw there was only two people present. Each of the
22 persons involved inside of the car joined the conspiracy with
23 the intent and understanding how it was going to be carried
24 out, that they were going to do a robbery.

25 What about the robbery? Count 2. You have the video

1 evidence. Again, I'm not going to play it. A terrifying
2 moment for Gardy Dertelus who is forced in the back room at
3 gunpoint with three guns pointed in his face, pistol whipped,
4 and \$20,000 approximately of items, cash was taken from him,
5 the property of T-Mobile, done by force, done at gunpoint. You
6 saw it. There's really nothing much more to talk about. The
7 store was robbed and so was he.

8 The robbery has to affect interstate commerce.
9 Hearing evidence from the manager of the T-Mobile store that
10 the items, including iPhones, are manufactured out of the
11 country in China. The corporate headquarters is in New Jersey.
12 The national headquarters of T-Mobile is in Washington. The
13 FedEx sends from Texas all over the country. The store was
14 closed afterwards for a period of time, closed early. Remember
15 the testimony of Gardy Dertelus? All those impacted in a very
16 minor way, which is all that's required under the law,
17 interstate commerce, as a result of the robbery.

18 How about Count 3, use of a firearm during and in
19 relation to the crime of robbery? This means the possession
20 of, the brandishing of or the shooting or discharging of. From
21 the get-go here we are not saying that he pulled the trigger on
22 any of the guns. What we are saying is the law holds him
23 responsible regardless.

24 Multiple theories support that. The Pinkerton theory,
25 whether it's reasonably foreseeable are the words you need to

1 focus on, to Diovanni Carter, that someone was going to
2 brandish a gun during the robbery. Let's think about that. He
3 gave them guns and sent them in to do a robbery. He certainly
4 doesn't think he's going to keep them hidden. You are going to
5 point them to someone to get them to do what you want them to
6 do.

7 What else? He directed them to shoot at the police.
8 "Got to get the boys up off me." Direct evidence of the
9 discharge of his -- direct knowledge, let alone reasonably
10 foreseeable knowledge, that the guns would be used and
11 discharged during the course of the robbery or the getaway.
12 It's all part of the robbery.

13 And what of the firearm offenses? They are broken
14 out, as the Court described them, as to two counts, Count 4 and
15 Count 5, both allege the same thing but different guns. First
16 is a stipulation that the defendant is or was at the time a
17 convicted felon and knew such. And, secondly, you heard from
18 Patrick Briody of the ATF that the firearms and ammunition all
19 traveled in interstate commerce, which is another element of
20 the charges.

21 What about the possession? Well, Martin says they
22 were handed out. The DNA says his major profile for the one
23 gun.

24 But what more broadly than that? What did you hear
25 for evidence right at the beginning of the trip down to

1 Brockton from Boston? Remember the words, "We got" -- we, "We
2 got to get right. We got to get right." And what was the
3 understanding of Martin? We got to go get guns. We got to get
4 guns. Joint possession of each of the guns by each of the
5 members involved in the robbery crew, the law holds them
6 accountable and holds him accountable.

7 A word or two about the plea agreement of Dennis
8 Martin. I want to talk about a couple of things. First, take
9 a look at the documents. They're both in evidence. There's a
10 mandatory minimum of seven years that he faces in prison.
11 That's the lowest his sentence can be provided by another
12 judge. Counsel described that. That's the terms of the
13 agreement.

14 The second part of the plea agreement that I want to
15 remind you of is he gets nothing, nothing in terms of a reduced
16 sentence from another court unless he tells the truth in his
17 testimony here. His motivation is to be truthful so that he
18 can get a possibility of a reduced sentence. That's the
19 arrangement. Take a look at the agreements to confirm that.

20 The final bit of evidence that I want to talk to you
21 about is evidence that we developed and took a long time, a
22 long time to put phone records in, right? Multiple: Sprint,
23 T-Mobile, all these different phone records. And then you
24 heard from Ryan Burke who kind of put it all together, and then
25 you can kind of see how we put all that stuff piece by piece

1 together so that he could tell you where these phones were at
2 certain times.

3 So one of the things he talked about is the
4 connectivity between these individuals. And the connectivity
5 shows you that, for example, when Boddie and the defendant are
6 together, there's no calls between them. While although they
7 have lots of calls back and forth in their call frequency, they
8 are showing a relationship. When they're not together, there's
9 phone calls. When they are together, there aren't.

10 What about the tracking evidence, more importantly?
11 The tracking evidence is described by Ryan Burke from the FBI
12 yesterday and then finishing this morning. Using the data that
13 he received from the records and using his experience and
14 training that he has, what did he use in this map to show you
15 the path of travel of the phones at issue, the three phones
16 listed at the top?

17 The defendant's phone, more specifically, tracks from
18 Boston, tracks down to Brockton between 6:45 and 7:17 the night
19 of the robbery.

20 What does it show you moments later at the exact time
21 of the robbery which occurred at approximately 7:10? All of
22 those phones are in the area and hitting off the tower right
23 near the T-Mobile store. His technology and the records put
24 them all at the location of the T-Mobile store at the time of
25 the robbery. Powerful evidence, I submit to you, of their

1 involvement and participation

2 And, finally, what about after the flight, which is
3 consistent, I would submit to you, with the tracker, the 3Si
4 tracker evidence. What did you learn about Carl Avenue where
5 the car crashed and where Boddie lived? Later, from 7:30 to
6 9:30, the car, the phones are located, in particular the
7 defendant's phone, in the area of Carl Avenue. That was his
8 phone. He had it with him. He used it to get in touch with
9 Boddie to get away, but the trail was followed by Ryan Burke.

10 In conclusion, after considering all of the evidence,
11 the witnesses and exhibits we provided to you, I'm going to ask
12 you to return a verdict finding the defendant guilty of each of
13 the five charges. And I'm going to ask you to go on to Count
14 3, Section 4A and 4B of the verdict form, to check the box as
15 proven that the defendant was involved and was responsible for
16 brandishing the gun and also was responsible for the discharge
17 of the gun.

18 MR. SULTAN: May we approach briefly, Your Honor?

19 THE COURT: Yes. Why don't you all take a stretch
20 before we swap.

21 (At sidebar.)

22 MR. SULTAN: Your Honor, I didn't want to interrupt,
23 but I object to the government's statement that Mr. Martin has
24 to do at least seven years. My understanding is that if they
25 file a 5K motion, the sentencing judge will be free to sentence

1 below that number. And if I'm right, then I would ask the
2 court to give a correction.

3 THE COURT: What's the exhibit number?

4 MR. MALLARD: I don't have it in front of me.

5 MR. SULTAN: 89 or 90 are the cooperation agreement.

6 THE COURT: And it's in the cooperation agreement?

7 MR. MALLARD: It's in the plea agreement, Judge. The
8 cooperation agreement describes the 5K motion. It does not
9 describe a motion under 3553(e) which would get him under the
10 mandatory minimum. Counsel is wrong on that. 5K does not get
11 him below the mandatory minimum.

12 MR. SULTAN: Well, 3553(e).

13 MR. MALLARD: It's not in any agreement. There is no
14 reference to -- there's no agreement to a 3553(e).

15 THE COURT: They don't agree to go below. They don't
16 agree to the motion that would let the judge go below the
17 mandatory minimum.

18 MR. SULTAN: So they are precluded by the agreement;
19 is that the way Your Honor --

20 THE COURT: Is that the position you're taking?

21 MR. MALLARD: That's the position we're taking.

22 MR. SULTAN: I don't know why it would be precluded.
23 I agree it's not referenced specifically in the agreement, Your
24 Honor.

25 THE COURT: Neither one of them say anything about the

1 mandatory minimum. And you're not going to file anything to
2 get him below the mandatory minimum?

3 MR. MALLARD: No.

4 MR. MacKINLAY: It's not in the agreement, Your Honor.
5 We will not be doing that. Absolutely not.

6 THE COURT: Okay.

7 (End of sidebar.)

8 DEFENDANT CLOSING ARGUMENT

9 BY MR. SULTAN:

10 Good afternoon.

11 (Jurors in unison: Good afternoon.)

12 The government will get another chance to address you
13 after I sit down, but this is my last chance to talk to you at
14 this trial directly. So I want to start by thanking all of you
15 for your service. You are truly the heart and lungs of our
16 system of criminal justice. You stand or sit between the
17 government as the accuser and an ordinary citizen as the
18 accused.

19 You come from different walks of life, from all over
20 Eastern Massachusetts, from Billerica to Westport to everywhere
21 in between. You were drafted into this service. You all
22 sacrificed to be here and to serve this very important role
23 that is so critical to our system of criminal justice. And on
24 behalf of myself and on behalf of my partner, Kerry Ferguson,
25 and on behalf of my client, Diovanni, I just want to thank you.

1 Now, since I have a lot to say, and since I don't get
2 another chance, I may refer to my notes from time to time as
3 I'm speaking with you. I hope you won't hold that against me
4 or against my client.

5 At the beginning of this trial, during the opening
6 statements, I told you that this case really came down to one
7 thing. Do you find Dennis Martin to be a reliable and
8 trustworthy person? And that really hasn't changed. That's
9 really where we are at the end of the trial.

10 I told you I expected the government would present a
11 parade of other witnesses, and that's happened, too. I think
12 they presented 44 other witnesses and well over 100 exhibits.

13 All of that evidence amounted to little or nothing
14 that helps you decide what you have to decide, not was there a
15 robbery at the T-Mobile store. I told you in the opening
16 statement that's true. That happened. Those three men did go
17 into the T-Mobile store and rob it that night. You didn't need
18 a parade of witnesses and exhibits to prove that. Those three
19 men aren't on trial. My client, Diovanni Carter, is on trial.
20 And all of that other stuff didn't really help you decide that
21 and certainly didn't prove it.

22 Now, you just heard the government's story. And, in
23 effect, what the government is asking you to do to convict
24 Diovanni is to engage in speculation and conjecture. But you
25 heard Judge Burroughs just before lunch, the beginning of her

1 instructions. She told you, among many other things, you may
2 not convict the defendant based on speculation or conjecture.
3 You can't do that. You need proof. You need proof beyond a
4 reasonable doubt, and that's not even close in this trial, not
5 even close.

6 Now, I'm not going to present to you any diagrams or
7 maps or photos or recordings. All of that stuff is really
8 designed to sway you. Now, social scientists tell us that that
9 stuff works, but I don't think you'd be fooled.

10 I know I'm dating myself, but when I grew up there was
11 a show on TV called *Dragnet*. And the detective on that show,
12 Sergeant Joe Friday, and he would go out and interview
13 witnesses. And he would walk up to a woman, and she'd say
14 "What do you want to know?"

15 And he'd respond, "Just the facts, ma'am."

16 Well, let's just talk about the facts. That's what
17 we're here for. Not conjecture, not speculation, not stories.
18 The facts, the evidence.

19 And the government's evidence in this trial really
20 consisted of two parts. Dennis Martin, the centerpiece of
21 their case, and some other stuff. So let's start with the
22 other stuff, and then we'll turn to Mr. Martin.

23 So what's the other stuff? Well, DNA, that was part
24 of their case. You heard from Kira Snyder, the DNA analyst.
25 You heard from Sharon Salem, the woman who swabbed the Ruger,

1 among other things. And I don't mean any disrespect to these
2 people. They were very nice women. They're doing their jobs.

3 But as jurors, you have to look critically at the work
4 they did in this case. They're trying to convict my client of
5 serious crimes based on the work they did in this case at that
6 lab. So what was the evidence about that?

7 Well, Sharon Salem, she told you there was three
8 different pieces of evidence. This stuff needs to be done
9 right. This stuff needs to be done carefully. We all know
10 about forensic science and how it is important. It can provide
11 real important information when it's done right.

12 Three pieces of evidence: the Ruger gun, the
13 magazine, and the ammunition. What did she do? She swabbed
14 all of that stuff together and stuck that swab in a tube. So
15 as she told you, there's no way to know what came from what
16 anymore. She admitted that's not what the protocols say you're
17 supposed to do, but that's the way she did it. And then she
18 turned it over to Kira Snyder to analyze it.

19 So Kira Snyder goes through her steps. And the first
20 step she goes through, she does the -- she does the extraction
21 and then she does the quantification. And she's doing this
22 first ST -- it's called STR testing. And lo and behold, what
23 does she discover? More than two-thirds of the DNA on that
24 combined swab is female. She doesn't put that in her report.
25 She doesn't mention that.

1 Then she goes on and she decides, well, I'm only
2 interested in males. That's really who we're after here are
3 guys. So she does this second kind of testing, the Y-STR
4 testing, right? And she does the Y-STR testing. She concludes
5 that there is a combination of DNA on that combined swab with
6 everything smushed together of at least four different males on
7 that swab. She can't identify any individual. She tells you
8 that. She can't identify somebody with Y-STR.

9 And what else do we find out about the work she did on
10 this case? Well, it was a positive control, a positive control
11 that's supposed to be DNA in there so we know that the test is
12 operating correctly. She ran a positive control. There was no
13 DNA. Oops. That's a problem.

14 There's negative controls. There's not supposed to be
15 anything in the negative controls so we know there's no
16 contamination. Oops. There was DNA in the negative control.
17 That's a problem.

18 She just kept right on rolling. She said, "Oh,
19 contamination in our lab, very rare occurrence."

20 Well, I showed her, and we now have in evidence six
21 different instances of contamination on this very same kind of
22 testing, Y-STR testing, the same kind of testing she did in
23 this case, six instances of contamination over a 20-day period.
24 Six times contamination. She admitted if there's
25 contamination, the results are going to be invalid, the results

1 are unreliable. Six times in a 20-day period. There's
2 contamination in the STR part of that lab.

3 What kind of a DNA lab is this? They want you to rely
4 on this evidence beyond a reasonable doubt to convict Diovanni
5 Carter of serious crimes. Are you kidding me?

6 You heard from Mr. Yoon yesterday. Mr. Yoon typed
7 Diovanni's buccal swab, his profile. Okay. Well, Mr. Yoon had
8 a contamination problem, too, if you recall, in his work, but
9 he typed Diovanni's profile. And we learned that 2,500 to
10 3,000 males in the state of Massachusetts would have that exact
11 same profile, including all of Diovanni's male relatives. Is
12 that Diovanni's DNA on that sample? It could be. It's
13 possible. We don't know that it isn't. Proof beyond a
14 reasonable doubt.

15 And if somehow you decide they prove Diovanni's DNA
16 was on that sample, well, we don't know when it was put on
17 there. We don't know how it was put on there.

18 You heard Kira Snyder, she even told you about
19 secondary transfer. I shake her hand, she touches the
20 microphone, my DNA ends up on the microphone, even though I
21 never touched the microphone.

22 We don't know anything about that DNA. Proof beyond a
23 reasonable doubt? That's the DNA.

24 Well, what other stuff did they present to you? Well,
25 there's the cell phone stuff, a whole lot of cell phone stuff.

1 Yesterday was a really long day, maybe it was the day before.
2 They all kind of run together. But what is all that cell phone
3 stuff about? Today you saw Exhibit 119. That's the exhibit
4 the government put in with all those pages blacked out. And
5 then you saw Exhibit, I think it's 209, the same document where
6 those pages are not blacked out.

7 And what did Sprint itself say about this PCMD data,
8 which is what Special Agent Burke was relying on? They said it
9 may be inaccurate. It may be unreliable. This is the company
10 itself. This is what they say about that data. It's not to be
11 used to tell where somebody was located, or where their phone
12 was -- a particular phone was located even though some people
13 like to use it that way. It's not proof beyond a reasonable
14 doubt.

15 And all this stuff about the phones, basically they're
16 trying to prove guilt by association or proof by location.
17 Well, Diovanni was talking to these other people who were
18 involved; and, therefore -- therefore, Diovanni is involved?
19 That's not how we convict people of serious crimes in this
20 country if you are talking on the phone with somebody who
21 happens to be involved in a crime.

22 Or by location. The 2207 phone was in Brockton.
23 Well, okay, it was in Brockton. Does that mean he was
24 participating in the robbery of the T-Mobile store? Does it
25 prove that? He's got family living less than a mile from the

1 same location. And what's the evidence that Diovanni Carter
2 even had that phone that day? No evidence of that. They just
3 want you to speculate that, well, he probably had that phone.

4 All of that cell phone stuff does not amount to any
5 proof that Diovanni Carter was involved in this robbery. Did
6 he talk to some of these people? Probably. But even probably
7 is not enough.

8 Judge Burroughs told you this morning that even if you
9 find -- even if there is a probability, even a strong
10 probability in your minds that Diovanni was involved in this,
11 that's still not enough to convict him. And they don't even
12 have a strong probability.

13 They have speculation and conjecture. That's what
14 they have, and that's not something that you can rely on in a
15 court of law under our system of criminal justice.

16 Well, so what other stuff do they present? Oh,
17 there's Google search stuff. Well, there's -- there were
18 Google searches on a Google account linked to Diovanni Carter
19 "T-Mobile near me." Well, that's certainly proof that he
20 committed an armed robbery? Give me a break. I mean, that's
21 like throwing a bunch of stuff against the wall and hoping that
22 something will stick. That's not proof.

23 And then what other stuff do they present? Well,
24 there's James Boddie. Their whole theory, oh, Diovanni Carter,
25 he was headed for James Boddie's house. And he somehow got

1 away because he got into James Boddie's house and he hid there
2 so he wouldn't be captured. That's a great story. Is there
3 any proof at all that happened? None. It's just speculation
4 and conjecture.

5 Officer Robinson, what did he tell you about this car
6 he was bravely following, that these robbers are shooting at
7 him? He said the driver looked lost. He didn't know where he
8 was going. Is that consistent with Diovanni on his way to
9 James Boddie's house? Of course not. No evidence at all about
10 James Boddie or his role in anything. It's just speculation.
11 It's just a story.

12 Could it be true? I suppose it could be true. You
13 can make up any story you want, but that's not what we're here
14 for. We're not here for stories. It's not proof.

15 What else do they have? What other stuff did they put
16 on? Well -- oh, the prosecutor told you about this Noons,
17 somebody named Noons. Was there any evidence at this trial,
18 other than from the mouth of Dennis Martin, and we'll get to
19 him, about someone named Noons? Just another part of the story
20 they're making up. It's not proof beyond a reasonable doubt.

21 And then they have this call that they just played for
22 you, a call from Darius Carter to his parents. "Tell Diovanni
23 to keep his mouth shut."

24 Well, maybe Diovanni knew something about Darius being
25 involved in this robbery. They're brothers. Maybe he knew

1 something. Maybe Darius was worried that Diovanni was going to
2 provide information that was going to hurt Darius. The fact
3 that Darius is concerned about whether Diovanni keeps his mouth
4 shut, that doesn't prove that Diovanni was involved.
5 Speculation, conjecture, that's all that is.

6 Now, we'll get to Dennis Martin. I want to make sure
7 I didn't forget anything before we get to Mr. Martin.

8 Oh, one other thing that you saw during the
9 prosecutor's closing. All this pointing at Diovanni Carter,
10 pointing at him over and over and over, what does that prove?
11 Is that proof? It's not proof. That's pointing.

12 So let's get to Mr. Martin because he's really what
13 this case is about. Do you want to rely and trust Mr. Martin?
14 Do you find him to be a trustworthy individual?

15 Now, Judge Burroughs told you several things this
16 morning about your evaluation of Mr. Martin's testimony, and
17 what the judge says in this courtroom goes. So let me just
18 read to you some of the things that she said, if I may.

19 She told you to consider Dennis Martin's testimony
20 with particular care and caution. She told you he may have a
21 reason to make up stories because he wanted to help himself.
22 You think?

23 So what kind of a person is Dennis Martin? Well, you
24 learned he was deported to the United States at age 18 for,
25 among other thing, armed robbery. You learned that in the six

1 years since, he's been convicted of multiple crimes: assault
2 and battery, larceny, drug dealing, and armed robbery while
3 masked. You've learned he's been on probation several times
4 and has had his probation revoked.

5 Dennis Martin is a man who lies and cheats and steals
6 and drug deals his way through life. Is this the kind of
7 person that you want to find to be reliable and trustworthy?
8 This is the person the government has brought you. This is who
9 he is. He lied repeatedly to police officers. He's lied
10 repeatedly to courts. He lied in this very courthouse to Judge
11 Woodlock last August.

12 And what are some of the lies he told in this case,
13 long before he came to court today? That night, the night he
14 was caught after robbing a T-Mobile store, "I never had a gun."
15 We know that's a lie. You saw the videotape. "Some white
16 woman, some white girl came and took the guns." That's another
17 thing he said that night. Well, you know that's a lie. The
18 guns were found by the police.

19 What else did he say? He said, "Oh, this ammunition
20 that was on him," he has -- he said -- he told the police that
21 night he had no idea where that ammunition came from. Another
22 lie.

23 He told the police that nobody struck the store
24 employee. You know that's a lie. You heard from poor
25 Mr. Dertelus who was hit on the head with a gun. Why would you

1 believe a single thing Dennis Martin said.

2 Now, you got to see Dennis Martin testify from the
3 witness stand, the government's star witness presented to you
4 under a cooperation agreement. Sat right there just a few feet
5 away from you and testified. Well, direct examination went
6 fine. He had gone over that repeatedly with the prosecution
7 team. That went fine. He was able to get out his whole story
8 under direct examination. No problem.

9 But then we came to cross-examination. The Supreme
10 Court in a case, quite a few years ago now, said -- called
11 cross-examination the greatest legal engine ever invented for
12 the discovery of the truth. And you saw that, the truth of
13 that statement right before your eyes in this courtroom when
14 Dennis Martin was on cross-examination.

15 Think about his affect, how he squirmed, how he looked
16 down, how he wouldn't have any eye contact, not just with me
17 but with you. How he tried to avoid answering my questions,
18 claiming he didn't understand the simplest questions because he
19 didn't want to answer them.

20 Martin didn't want to admit anything until I showed
21 him his own words, either on paper or in a recording, and then
22 he had to own up to it or say he didn't understand. But unless
23 I -- until I showed him his own words, he wouldn't admit to
24 anything. Is that the kind of person you want to trust and
25 rely on in a serious case?

1 So what were some of the things that Dennis Martin
2 finally owned up to on cross-examination? Well, we learned
3 that the name of the woman he was with that day was Amanda
4 Barata. He had never given the government that name, but he
5 knew the name. He knew exactly who she was.

6 And, in fact, he had sent somebody, one of his pals,
7 to beat her up after he was put in jail. Why did he want her
8 beaten up? Why didn't he want the government to know who she
9 was? Was he worried that she might say something that would
10 ruin his whole little plan of getting out of this mess by
11 falsely implicating Diovanni Carter?

12 What else did we learn when he was on
13 cross-examination? Well, we learned that he had a cell phone,
14 one of his two cell phones that he didn't want the government
15 to get. He really didn't want them to get that cell phone. He
16 told his mother, "Don't let them have that cell phone. Tell
17 them my little brother broke it."

18 Why didn't he want the government to have that cell
19 phone? If you look at his cooperation agreement -- his
20 cooperation agreement, which is, I think, Exhibit 90, says he
21 has to provide all things that the government asks. If they
22 want some piece of evidence that he has, he has to give it up.
23 His cooperation agreement says he can't protect anybody. He
24 has to give all answers. He didn't comply with his cooperation
25 agreement. He didn't tell them Amanda Barata's name because he

1 didn't want them to find her.

2 He didn't give up that cell phone because he didn't
3 want them to see that cell phone and what was on that cell
4 phone because that might have messed up his whole little plan,
5 too.

6 What else did we learn? We learned he was dealing
7 drugs from jail. Was that part of his deal with the
8 government, too?

9 And we learned something else really important that he
10 owned up to. He admitted that just a few weeks before he
11 robbed the T-Mobile store he did another armed robbery, an
12 armed robbery with his friend Stephan Rosser-Stewart, a
13 convenience store. He wasn't sure if it was in Quincy, but he
14 remembered that robbery.

15 And he also admitted on cross-examination that when he
16 did that robbery just a few weeks before he did the T-Mobile
17 robbery, he used the same gun, the Ruger, the Ruger .380. He
18 had that gun. He didn't need Diovanni Carter to give it to him
19 on January 26th. He had it. He had just robbed another place
20 a few weeks earlier, hadn't gotten caught. That's a very
21 important piece of information that he had to own up to on
22 cross-examination.

23 Who was he covering up for? Was he covering up for
24 his friend Terrell Jackson, who called hundreds and hundreds of
25 times and whose wallet and ID were in that car? Was he

1 covering up for Amanda Barata, his friend and business partner,
2 I think he agreed, called her, whose name he didn't want the
3 government to know? Somebody else. Who knows? I don't know
4 the answer to that.

5 But we do know that he falsely implicated Diovanni
6 Carter in an effort to trade Diovanni Carter's liberty for his
7 own and get a lenient sentence. We do know that.

8 Now, unfortunately, the government bought the story
9 that Martin was telling. They gave him his cooperation deal.
10 He's looking for a lenient sentence despite his long record,
11 despite what he did that night. He doesn't have his lenient
12 sentence yet. He's still waiting for it. He hasn't been
13 sentenced. They're holding that over his head.

14 He told you on cross-examination he needs the
15 government to file this motion, a motion saying that Dennis
16 Martin has cooperated, has provided substantial assistance to
17 the government in the prosecution of somebody else. That's his
18 golden ticket. That's what he needs to get what he's looking
19 for. That hasn't happened yet. He's still waiting for his
20 ship to come in.

21 So do you think that he has an incentive to please the
22 government, to say what they want him to say at this trial so
23 that he'll get his golden ticket? Isn't that pretty obvious
24 that he's got that motive, that he's got a reason to falsify
25 his story in order to help himself? Isn't that what you saw

1 right in front of you on the witness stand?

2 You know, each and every one of you, you deal with
3 people every day. You make judgments about who you can trust,
4 who you can rely on. You know how to do that. It's part of
5 life. I would submit that each of you has kind of a built-in
6 mechanism. We can call it a B.S. detector. You've got your
7 own B.S. detector, every one of you. You know it. You know
8 when someone is telling you something that you can't trust and
9 rely on.

10 Well, use your B.S. detector, each of you, and I'm
11 confident that you'll make the right decision about Dennis
12 Martin and whether you can trust and rely on what he said in
13 this courtroom to convict my client.

14 One of my real heroes in the law, former Supreme Court
15 Justice William O. Douglas, once wrote, "Any person faced with
16 the awesome power of government is in great jeopardy even
17 though innocent."

18 You saw that, the truth of that on display here, too.
19 The awesome power of the government, the power -- the resources
20 they have, bringing in dozens of agents and law enforcement
21 officers, and all kinds of analysis and diagrams and
22 helicopters and records and subpoenas and searches, all of
23 that. They have the power to take all -- to do all of that,
24 the power to give somebody leniency to buy their testimony.
25 They have that power, too. That's a lot of power. That's a

1 lot of power the government has, that they can bring to bear on
2 any individual citizen.

3 All that Diovanni Carter has is me and Kerry Ferguson.
4 That's it. But, you know, that's where you come in. That's
5 where you come in. You come in to kind of level the playing
6 field because it's not up to the government to decide whether
7 or not somebody is guilty of a crime in our country. You get
8 to decide that. That's your call and only your call, and that
9 is part of what makes our country a free country.

10 I submit it was an insult to you, each and every one
11 of you, and to our system of criminal justice for the
12 government to make the deal they did with Dennis Martin and
13 bring him in here to peddle his lies to you. That's not
14 justice, but it's your decision. Thankfully, it's your
15 decision.

16 Diovanni's fate is in your hands, and I ask you to
17 return a verdict that each of you will be proud of. I ask you
18 to find Diovanni Carter not guilty of each and every charge.

19 Thank you.

20 THE COURT: The government has an opportunity to do a
21 brief rebuttal. Are you going to rebut, Mr. Mallard?

22 MR. MALLARD: Yes, Your Honor.

23 THE COURT: You guys want to stand up and stretch
24 before we start while he's walking up there? If you want to,
25 you can.

1 GOVERNMENT REBUTTAL STATEMENT

2 BY MR. MALLARD:

3 The defendant just gave their closing, and the one
4 thing you didn't hear him argue at all was that someone else
5 had Diovanni's Carter's phone that night. Diovanni Carter had
6 it. He had it that whole day, that whole night, right outside
7 the store in Winnifred Street, right where Dennis Martin said
8 he was waiting for them after they robbed the store.

9 He had it on him while he was driving, just like
10 Dennis Martin said, taking the right, not the left to the
11 highway, taking a right when he made the call to Noons to try
12 and sell the phones. That's Diovanni Carter's guy, Noons,
13 ending in 2029.

14 The phone was in Diovanni Carter's hands. It never
15 left. He used it on the 25th to call his work. He used it on
16 the 28th to say he's not going back.

17 To hear defense counsel tell it -- and he talked a lot
18 about Dennis Martin, but you heard his testimony -- he's just a
19 common criminal. A man with drug dealing, an armed robbery in
20 his background.

21 He's not going around sprinkling DNA on guns that
22 match this defendant's profile. He's not in a position to know
23 at the time he identifies Diovanni Carter that his cell site
24 records are going to place him outside the store. He is not in
25 a position to know that DNA is going to be found on the gun or

1 match to Diovanni Carter eight months later.

2 He's also not in a position to know on January 29th
3 that this defendant's Google history that very morning would
4 show searches for "T-Mobile" for the first time ever or that at
5 9:19 his Google records would show a search for *Brockton*
6 *Enterprise* two hours after the robbery for the first time ever.

7 These are things that Dennis Martin couldn't know,
8 would have no idea would exist, and would have no idea that the
9 government would go and get and put into evidence for you.

10 Dennis Martin may be a lot of things, but he's not a
11 killer. He didn't shoot his gun at the officers that night.
12 And for all the things that counsel accused him of, that's not
13 him.

14 You do know who is of that character and of that
15 caliber. You heard testimony about why the men shot their
16 guns. They shot their guns because Diovanni Carter told them
17 to. And you know they shot their guns at the order of someone
18 because both guns fired within that same window, eight or nine
19 seconds. If you don't expect gunfire, you're not going to be
20 shooting right after you hear it. But both men shot at roughly
21 the same time in the same direction.

22 One of those bullets struck Darius Carter, went
23 through and through. That was Stephan. And the other gun
24 fired by Darius Carter, the casing found by Baltazar Goncalves,
25 linked directly to that gun.

1 Now, Dennis Martin is just the beginning of this
2 investigation. He gave a name, identified a photograph of
3 Stephan, and then identified another photograph of Diovanni
4 Carter that night. What followed and what you heard throughout
5 the course of this trial were the results of that
6 investigation.

7 To say this case lives and dies by Dennis Martin
8 really kind of ignores everything that we spent the last week
9 and a half doing. All this evidence is about putting you in a
10 position to better evaluate what he told you about that night
11 and also to independently prove the same facts.

12 Because really what Dennis Martin says is just a story
13 from one perspective. But now with the fulsome evidence that
14 you heard from the cell site and the Google, you were now able
15 to get into the mind of Diovanni Carter a little bit in terms
16 of what he was searching for, see who he's calling. You get a
17 piece of the story that Dennis Martin has no idea about.

18 You know as jurors where Diovanni Carter went that
19 night because this defendant, Diovanni Carter, was calling
20 James Boddie over and over and over again to get to the house
21 before the helicopter came. Dennis Martin had no idea about
22 that. He was already arrested. That's what this trial is
23 about. That's what this evidence is that you heard proved to
24 you.

25 This was the defendant's plan that fell apart. The

1 defendant managed to get away because he happened to know
2 someone that lived in the area, just a few houses down the
3 street. Every piece of evidence you heard over the course of
4 this trial proves it. And all of the evidence puts this
5 defendant, Diovanni Carter, in the driver seat of that car, in
6 the driver seat of this plan. And, to put it bluntly, the maps
7 and phone records you heard yesterday from Ryan Burke
8 essentially ends all discussion about that.

9 Diovanni Carter got away that night, but he cannot run
10 from the evidence that you heard over the course of this trial.
11 You've heard, seen, watched, seen zoomed in on, expanded,
12 searched through phone records, video.

13 Return a verdict consistent with all that evidence --
14 return the verdict that the evidence, when you really consider
15 it, the only verdict consistent with the evidence -- and find
16 him guilty of all five counts.

17 Thank you.

18 THE COURT: All right. You are about three minutes
19 away from beginning your deliberations. I want to say a few
20 words about your deliberations.

21 Each of you must decide the case for yourself, but you
22 should do so only after considering all of the evidence and
23 listening to reasoning of your fellow jurors.

24 You should not hesitate to reconsider your views from
25 time to time and to change them if you are persuaded, if that

1 is appropriate. Do not come to a decision simply because other
2 jurors insist it is right, and do not surrender an honest
3 belief about the weight and effect of the evidence just to
4 reach a verdict.

5 Your verdict must be unanimous as to each of the
6 questions I'm going to ask you to answer on the verdict form.

7 I'm going to ask Juror Number 1 -- that's you -- to
8 serve as the foreperson. The foreperson will have the same
9 voice, the same vote as the other deliberating jurors. The
10 fact that one of you is the foreperson does not give that
11 person any special status in your deliberations. You are all
12 equal. The foreperson will act to the extent accountable as a
13 moderator of the discussion and will serve as the jury's
14 spokesperson.

15 The foreman's most important obligation is to ensure
16 that any juror who wishes to be heard on a material issue has a
17 full and fair opportunity to be heard by his or her fellow
18 jurors.

19 If you as a group decide to take a recess during your
20 deliberations, you should stop talking until the recess is
21 over. Do not discuss the case during a recess when not all
22 jurors are present.

23 If it becomes necessary during your deliberations to
24 communicate with me, you may do so by sending a note to the
25 court officer who will be standing outside of your door.

1 No member of the jury should ever attempt to
2 communicate with me accept by simply signed writing. If you do
3 communicate with me, do not tell me in the note how you stand
4 numerically or otherwise in any issue before you until after
5 you have reached a verdict. You are not to communicate with
6 anyone but me about the case outside the jury room and then
7 only in writing.

8 In turn, I will communicate with you in writing or
9 orally here in open court on anything concerning the case.

10 On matters touching simply on the arrangements for
11 your meals schedule and convenience, you're free to communicate
12 with either the court officer or Karen, and that can be done
13 orally rather than in writing.

14 After you've reached unanimous agreement on the
15 verdict, your foreperson will fill in the verdict form, sign
16 it, date it, tell the court officer outside your door that you
17 are ready to return to the courtroom.

18 Once you return to the courtroom, your foreperson will
19 deliver the completed verdict form as directed in open court.
20 Here is a copy of the verdict form.

21 We're going to send up a copy of the jury instructions
22 for each one of you. We typically only send up one verdict
23 form. If for some reason you want more, just let us know.
24 We'll get you some more. You'll see the first page is the
25 cover sheet to the verdict form, and then there's one page for

1 each count, essentially.

2 So the first page is for Count 1, conspiracy to
3 interfere with commerce by bribery. You check off not guilty
4 or guilty.

5 Count 2, interference with commerce by bribery.
6 Again, you check off not guilty if you find that the government
7 has not proven each element of the offense beyond a reasonable
8 doubt. You check guilty if you find that they have. And that
9 can be either on the theory of participating directly, him
10 participating as an aider or abetter, or under Pinkerton
11 liability.

12 Count 3, the same thing. That's the brandishing,
13 using, or carrying a firearm. So not guilty if the government
14 hasn't met its burden. Guilty, and you may find guilt proved
15 under any one of the three theories: Committed the acts
16 himself, he was an aider or abetter, or under Pinkerton
17 liability.

18 And then you see it's like a decision tree here. If
19 you answer not guilty on Question 3, you go to Question 5,
20 which is the fourth count. If you do answer guilty on Count 3,
21 you have to answer two more questions, 4A and 4B. And that is,
22 basically: Do you find that the government proved beyond a
23 reasonable doubt that he brandished the firearm in relation to
24 the crime? And 4B, I'll ask that if you find that he
25 discharged the firearm in connection with the crime, and you

1 can check off one of those, none of those. You can find proven
2 or not proven as to both of them or none of them.

3 Count 4 and Count 5 are felon in possession of a
4 firearm or ammunition, and those you just check off guilty or
5 not guilty.

6 And then you'll see the very last page. It just says
7 that your deliberations are complete, and you should notify the
8 court security officer in writing that you've reached a
9 verdict.

10 As far as I'm concerned, you are ready to begin your
11 deliberations. Does anyone want to be heard at sidebar before
12 I send them out?

13 MR. MacKINLAY: No, Your Honor.

14 MR. SULTAN: No, Your Honor.

15 THE COURT: So off you go. The case is yours now.
16 The jury instructions, the verdict form, and the exhibits will
17 be up very shortly. Okay.

18 THE CLERK: All rise for the jury.

19 THE COURT: I'm sorry. You last three are the
20 alternates. You three are alternates. We are going to seat
21 you in a separate room. They're going to have six feet between
22 each of you, if that's what you want to do. We may need to
23 substitute you in. We just never know. So it's important that
24 you stay pristine. So you have to keep an open mind. You
25 can't talk about the case, and you can't do any other research

1 while you're sitting in that room.

2 So I don't know how long we're going to want to go
3 today. But after today, you can certainly bring in phones,
4 laptops, and books, and anything else you want, to keep
5 yourself entertained. And if you want to kind of wander around
6 back there, you can do that, too.

7 You already have your phones. So you can bring
8 Monopoly or something tomorrow, if you are still here. I'm
9 sorry. I know it can be frustrating to be the alternates. But
10 especially when we're picking a jury for a three-week trial, we
11 have to make sure that we have 12 when it all ends.

12 And you guys have all been amazing about showing up.
13 And even with the uncertainty of the coronavirus, everyone has
14 been here. And we haven't needed to use an alternate, but we
15 may still have to use an alternate. So we are going to keep
16 you here and ready.

17 All right. You can take them out, Karen.

18 THE CLERK: Okay.

19 (Recess taken from 2:00 to 2:37 p.m.)

20 MR. MALLARD: The government is content with the
21 exhibits.

22 MS. FERGUSON: The defense is content, as well.

23 THE CLERK: Thank you.

24 (Recess taken from 2:39 to 2:53 p.m.)

25 THE CLERK: All rise for the jury.

1 (The Jury is present for the following.)

2 THE CLERK: Court is in session. Please be seated.

3 THE COURT: I am really sorry about this. When I
4 thought the trial was going to last three weeks, I agreed to be
5 at Boston College. And, of course, the way of the world, the
6 day I charge you is the day I am supposed to be there by 3:30,
7 so I have to leave right at 3:00.

8 We are going to give you the option of staying, which
9 you really control your schedule. Once you're deliberating,
10 there's another judge that would be prepared to answer any
11 questions. But I understand from Karen that you want to leave
12 now and come back at 10:00 tomorrow morning, which is
13 absolutely fine.

14 From my perspective, it's even better so you don't put
15 any pressure on you in terms of time of putting on a verdict.
16 And I would like to thank you when it's all over. So I think
17 that works out great.

18 I don't typically, unless one of the parties has an
19 alternative request, I don't typically bring you into the
20 courtroom in the morning. When you are all here, you can
21 start. You understand that you are not to start before anyone
22 gets here.

23 Anyone feel they want to see them in the courtroom?

24 MR. SULTAN: No, Your Honor.

25 MR. MacKINLAY: No, Your Honor.

1 THE COURT: Same thing at the end of the day. If
2 you're still deliberating at the end of the day tomorrow, just
3 let us know when you want to leave. The only thing I ask is
4 that you not sneak off and not tell us because we'll all be
5 sitting around waiting to hear from you.

6 And we'll provide the same accommodations in terms of
7 breakfast and lunch. And if you decide that for whatever
8 reason you want to work through dinner, just let us know in
9 advance to get you enough food to make sure that that happens.

10 So now you've heard the whole case and middle of
11 deliberating -- at least starting to deliberate. And this is
12 supposed to be, as you all understand, a group decision. So it
13 remains important that you not do any thinking about this or
14 collaborating about this when you're not all together in the
15 group. So just put it out of your mind tonight.

16 And, as I say, it's supposed to be a collective
17 decision made just within this group. And, even more
18 important, that you not talk to anybody else about the case and
19 let them influence your thinking on it. And, again, no
20 extracurricular research, which I am sure I've made more than
21 clear in my instructions. Your decision must be based on what
22 happens in this courtroom. So no homework nor extra research.

23 Anything else anyone wants to say?

24 MR. SULTAN: No, Your Honor.

25 MR. MacKINLAY: No, Your Honor.

1 THE COURT: So you've decided on 10:00 tomorrow.
2 That's great. We'll sort of see you at 10:00 tomorrow. But
3 once you are all there, go ahead and start deliberating. Okay.
4 Thanks very much. And, again, sorry about this.

5 THE CLERK: All rise for the jury.

6 (Adjourned at 3:00 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)

We certify that the foregoing is a correct transcript
from the record of proceedings taken March 4, 2020 in the
above-entitled matter to the best of my skill and ability.

/s/ Kathleen Mullen Silva

4/15/20

Kathleen Mullen Silva, RPR, CRR
Official Court Reporter

Date

/s/ Linda Walsh

Linda Walsh, RPR, CRR
Official Court Reporter